Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6739

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093
Counsel for Appellant
Tel. (617) 384-3333

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No._____

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vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Appellant appeals from his conviction from the Municipal Court of the City of Boston, Massachusetts, entered on February 27, 1974 on a charge of unauthorized use of a motor vehicle, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

JURISDICTION

Appellant was convicted on February 27, 1974 in the Municipal Court of Boston and notice of appeal was filed in that court on May 16, 1974. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sec. 1257(2).

Appellant submits that the Municipal Court of the City of Boston is a "highest court" of Massachusetts within the meaning of the words in Sec. 1257. From a conviction in a criminal proceeding in a district court of Massachusetts, there is no direct appellate review, but only a trial de novo, or collateral relief, e.g. habeas corpus. Chief Justice Tauro recently summarized this principle in Mann v. Commonwealth, 271 NE 2d 331 (1971) at p. 333:

> "In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts. See G.L. C.250 Sec. 9. It is reasonable to conclude that the Legislature intended that, upon appeal, the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial.[3] 3. See Duncan v. Louisiana, 391 U.S. 145, ... We need not speculate whether convictions in the District Court resulted from error."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Cohens v. Virginia, 6 Wheat. 264, 375-6; Kentucky v. Powers, 301 U.S. 1, 37-39; Largent v. Texas, 318 U.S. 418, 422; Thompson v. City of Louisville, 362 U.S. 199, 202; Powell v. Texas, 392 U.S. 516, 517.

QUESTIONS PRESENTED

1. Are the States bound by the federal rule of Callan v. Wilson, 127 U.S. 540 guaranteeing defendants a trial by jury in the first instance when charged with an offense carrying a possible jail sentence in excess of six months?

2. Do state two-tier trial de novo procedures which deny a defendant a trial by jury in the first instance for a crime carrying a possible prison term in excess of six months impose an unconstitutional burden on the right to a speedy trial and violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws Ch. 263 Sec. 4, Ch. 218 Sec. 26, Ch. 278 Sec. 2, 18, and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the Appendix.

STATEMENT OF THE CASE

A complaint was issued against appellant for the unauthorized use of an automobile, a criminal offense under M.G.L. Ch. 90 Sec. 24(2)(a) carrying a possible two year jail sentence.[1] On February 27, 1974, appellant was tried on this charge in the Municipal Court of Boston. Appellant duly moved the trial court in writing for a trial by jury in the first instance, asserting that this right was guaranteed by the Sixth Amendment pursuant to Callan v. Wilson, 127 U.S. 540 and Duncan v. Louisiana, 381 U.S. 145. The trial court denied this motion. The government placed its case in evidence and rested. The appellant did not testify or present any witnesses or introduce any evidence. At the conclusion, the trial judge found appellant guilty. Appellant brings this appeal to vacate the conviction of the Municipal Court of Boston.

The federal questions underlying this appeal were raised by appellant at his trial in the Municipal Court of the City of Boston by his motion for a trial by jury. In this motion, he expressly claimed his right to a speedy trial by jury under the Sixth Amendment citing Callan v. Wilson, supra, Duncan v. Louisiana, supra, Klopfer v. North Carolina, 386 U.S. 213, and Holliday v. State, 280 A. 2d 333, and his rights under the double jeopardy clause of the Fifth Amendment citing Benton v. Maryland, 89 S. Ct. 2056, and United States v. Jorn, 400 U.S. 470.

The entire record of the "non-record" Municipal Court of Boston comprises the complaint setting out the charge; appellant's written motion for a speedy jury trial in which he specifically claimed his constitutional rights; the trial judge's written denial on the motion; and his written guilty finding noted on the complaint. A copy of the entire record is set forth in Appendix pp. 11-15.

[1] The relevant part of M.G.L. Ch. 90 Sec. 24(2)(a) is set out in the Appendix, p. 11.

THE QUESTIONS ARE SUBSTANTIAL

1. Massachusetts criminal procedure comprises a two-tier trial de novo system. Defendants, for the most part,[2] are charged initially upon a complaint in the non-record district court where they cannot obtain a trial by jury. Upon a conviction in the district court, a defendant cannot obtain any direct appellate review,[3] but has an automatic right to "appeal" his conviction for a trial de novo in the Superior Court where he may obtain a trial by jury.[4] If the defendant fails to prosecute his "appeal", the superior court may default him and impose sentence for the crime he was convicted of in the district court by a magistrate.[5]

[2] The district courts in Massachusetts have jurisdiction over all crimes having an authorized punishment up to five year imprisonment. See M.G.L. Ch. 218 Sec. 26 set out in the Appendix p. 10.

[3] Extraordinary writs and collateral relief invoking the Supreme Judicial Court's supervisory powers are available.

[4] See M.G.L. Ch. 278 Secs. 2 and 18 set out in the Appendix p. 10.

[5] See M.G.L. Ch. 278 Sec. 24 set out in the Appendix p. 10.

The Supreme Judicial Court of Massachusetts held in Jones v. Robbins, 8 Gray 329, 341 that Massachusetts' two-tier trial de novo system does not violate Article XII of the Declaration of Rights of the Massachusetts Constitution[6] guaranteeing that no law "shall subject any person to ... infamous punishment ...without trial by jury" which words Chief Justice Shaw stated were "equivalent" to the clause — "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" — in the Sixth Amendment.

In Callan v. Wilson, 127 U.S. 540, Justice Harlan took note of Jones v. Robbins at page 553-4 and rejected its reasoning at page 556-7 by holding that the Sixth Amendment guarantee to a trial by jury meant trial by jury in the first instance: "Except in that class or grade of offenses called petty offenses, ...the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged."

Duncan v. Louisiana, 391 U.S. 145, 149 bound the states to the Sixth Amendment and by dicta, the rule of Callan v. Wilson, supra. See Duncan at page 148 ftn. 30, 181, 182 ftn. 21, 213. The Rhode Island Supreme Court in Holliday v. State, 109 R.I. 93 (1971) has held unanimously that Duncan has bound the states to the rule of Callan v. Wilson. The Supreme Court of Virginia has held the contrary in Manns v. Commonwealth, 213 Va. 322. The issue is undecided among the two-tier trial de novo systems of other states.

[6]Article XII of the Declaration of Rights of the Massachusetts Constitution is set out in the Appendix p. 9.

See ftn. 9 and 10 in Colten v. Kentucky, 32 LEd. 2d 584, 592 (1972) citing Massachusetts, North Carolina, Pennsylvania. Cf. Lemieux v. Robbins, 414 F2d 353, 355 ftn. 3 (1969) noting the two-tier procedure in Maine. See also: D. Non-Jury Trial for Misdemeanors Subject to De Novo Review, Appendix to opinion of Justice Harlan, Williams v. Florida, 399 U.S. 78, 141.

2. The companion issue presented by this appeal is whether the imposition of a trial without jury is an unconstitutional burden on the defendant's right to a speedy trial by jury which he was unquestionably entitled to under the Sixth Amendment. The two-tier trial de novo procedure is totally counter-productive to minimizing the "anxiety and concern of the accused", Barker v. Wingo, 33 LEd 2nd 101, one of the main purposes of the speedy trial guarantee. For the defendant who chooses not to disclose his defense, a trial in the district court is a meaningless proceeding. A conviction and "appeal" from a district court trial generates a "cloud of anxiety, suspicion and often hostility", Barker v. Wingo, supra, and United States v. Marion, 404 U.S. 307, 321, and shifts the burden on the defendant to prosecute his "appeal" to prove his innocence, M.G.L. Ch. 278 Sec. 24. See Holliday v. State, supra, alternatively holding that two-tier trial de novo procedures violate the speedy trial provisions of the Sixth Amendment.

Similarly, the two-tier trial de novo system inherently violates the underpinnings of the double jeopardy provisions of the Fifth Amendment — "/T/he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alledged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though

innocent he may be found guilty", United States v. Green, 355 U.S. 184, 187-188.

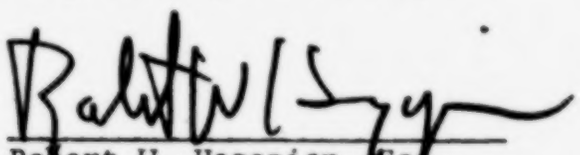
Implicit in limiting "the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", United States v. Jorn, 400 U.S. 470, is limiting it to a single proceeding which comports with constitutional standards, and it is no answer on the part of States to eventually offer the defendant a constitutional de novo adjudication, Ward v. Village of Monroeville, 34 LEd 2nd 269, 272 (1972).

Since the above issues effect the administration of criminal justice in at least ten states, and since there is a conflict between the decisions of the highest court of at least two of these states, it is submitted that the questions presented by this appeal are substantial and of public importance.

CONCLUSION

Appellant maintains that the Municipal Court of the City of Boston erred in denying him a trial by jury. He believes that such a denial violated his Sixth Amendment right to a trial by jury and to a speedy trial. It is submitted that the questions presented by this appeal are so substantial to require plenary consideration for their resolution.

Respectfully submitted,



Robert W. Hagopian, Esq.
Counsel for Appellant

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgement of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

The relevant portion of M.G.L. Ch. 218 Sec. 26 reads:

> District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective districts or otherwise made punishable therein; all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in ... .

The relevant portion of M.G.L. Ch. 278 Sec. 18 reads:

> Whoever is convicted of a crime before a district court may appeal to the superior court, and at the time of conviction shall be notified of his right to take such appeal.

M.G.L. Ch. 278 Sec. 2 reads:

> Issues of fact joined upon an indictment or complaint shall, in the superior court be tried by a jury drawn and returned in the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

M.G.L. Ch 278 Sec. 24 reads:

> If the appellant fails to enter and prosecute his appeal he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and if he is not them in custo-

> dy, may issue process to bring him into court to receive sentence.

The relevant portion of M.G.L. Ch. 90 Sec. 24(2)(a) reads:

> Whoever ..... and whomever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, ...

TO THE JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said City of Boston for the transaction of criminal business, within the County of Suffolk,

Richard Tracy

of the City of Boston, in the County of Suffolk, in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that

Steven Costarelli

of said City of Boston, on the twenty seventh day of November in the year of our Lord one thousand nine hundred and seventy three at the City of Boston aforesaid, and within the judicial district of said Court, upon a certain public way there situate called Albany street, (Emergency Parking Lot of the Boston City Hospital) did then and there use a certain motor-vehicle, to wit, an automobile the property of

Leroy Taylor

, the said Costarelli then and there well knowing such use of said automobile by him said Costarelli to be unauthorized

BEST COPY AVAILABLE

SUFFOLK, ss BOSTON MUNICIPAL COURT

CRIMINAL #_____

unauthorized use Ch. 90 Sec 24

trial date Feb. 6, 1974

COMMONWEALTH OF MASSACHUSETTS

vs.

STEPHEN ~~COSTENELLO~~ Costarelli RWH

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, ___ U.S. _____, Holliday v. State, 280 A.2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89S. Ct. 2056, U.S. v. Jorn, 400 U.S. 470.

By his attorney,

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COMMONWEALTH

ON COMPLAINT OF
Richard Tracy

vs.
Steven Costarelli

UNAUTHORIZED USE OF AUTOMOBILE

Gen. Laws Chap. 90 Sec. 24
30 days
$50-$500 or 2-Months-2 years or both
JAN 23 1974

PLEAD NOT GUILTY
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FOUND GUILTY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

MUNICIPAL COURT OF
THE CITY OF BOSTON
CRIMINAL 4 3

COMMONWEALTH OF MASSACHUSETTS

vs.

STEVEN COSTARELLI

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Steven Costarelli, the appellant above named hereby appeals to the Supreme Court of the United States from the conviction of the Municipal Court of the City of Boston on February 27, 1974. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies that he has served a copy of the above Notice of Appeal on Arthur Murphy, Boston Police Prosecutor, by mailing a copy of same first class, postage prepaid, Boston Police

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AMENDMENT TO JURISDICTIONAL STATEMENT

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093
Counsel for Appellant
Tel. 617-384-3333

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ON APPEAL FROM THE MUNICIPAL COURT OF
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AMENDMENT TO JURISDICTIONAL STATEMENT

Now comes the appellant and moves this Court for leave to file an amendment to his jurisdictional statement.

Introduction

On September 4, 1974, the Supreme Judicial Court of Massachusetts handed down its opinion in Whitmarsh v. Commonwealth, No. 15,354. Appellant submits that this decision conclusively settles the fact that this Court has jurisdiction over his appeal pursuant to 28 U.S.C. Sec. 1257(b).

Argument

In Whitmarsh v. Commonwealth, supra, the Supreme Judicial Court refused to review the constitutionality of Whit-

marsh's conviction in a district court[1] of Massachusetts in which Whitmarsh was denied a trial by jury upon a charge carrying a possible maximum jail sentence of two years. The court refused to accept discretionary jurisdiction under M.G.L. Ch. 211 Sec. 3 which grants to the Supreme Judicial Court "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided."[2] The Court further held that a trial de novo was the remedy "expressly provided" and hence it lacked jurisdiction over Whitmarsh's appeal.

In Mann v. Commonwealth, 271 NE 2d 331 (1971), 333, the Supreme Judicial Court

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[1] A district court is equivalent to the Municipal Court of Boston in Massachusetts' two-tier trial system.

[2] M.G.L. Ch. 211 Sec. 3 as amended by Ch. 1114 of the Acts of 1974 reads in part:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

made it clear that there was no procedure for direct appellate review of a district court trial – "In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the district courts." The appellee also concedes this point on p.4 of his brief – "...the judgment [of a district court] is not subject to further review...". In Whitmarsh v. Commonwealth, supra, the Supreme Judicial Court declared that it did not have jurisdiction for discretionary review over a conviction in a district court. Accordingly, appellant submits that the district court of Massachusetts is a "highest state court" within the meaning of these words in Section 1257(b).

Lastly, it should be observed that the appellee suggests that a district court of Massachusetts is not a "highest state court" because a defendant has a right to appeal by trial de novo to the Superior Court. The short answer to this is that a trial de novo is not a method of direct review. It is a new trial. Similarly, while it is true that a defendant may raise his double jeopardy claim by a motion to dismiss in the Superior Court as the Supreme Judicial Court suggests in the Whitmarsh case, this procedure is a collateral remedy and, as such, is immaterial to the issue of this Court's jurisdiction under Sec. 1257(b).

Respectfully submitted,

Robert W. Hagopian, Esq.

73-6739

S-15,354 SJC

WALTER E. WHITMARSH vs. COMMONWEALTH.

QUIRICO, J. On September 6, 1973, the plaintiff in the present case was tried in a District Court on a complaint charging him with the misdemeanor of operating a motor vehicle while under the influence of intoxicating liquor. G. L. c. 90, § 24 (1) (a), as amended through St. 1971, c. 1071, § 4. Before the trial started he filed a written motion for a trial by jury which was denied. After a trial before a judge of the District Court, at which he rested, without presenting any evidence, upon completion of the Commonwealth's case, he was found guilty and fined $100. He appealed therefrom to the Superior Court (G. L. c. 278, § 18), requesting the court to note that the appeal "was not to be considered a waiver of his demand for a trial by jury and was being made only to preserve that right procedurally." The appeal was entered in the Superior Court on September 10, 1973, and it has not been tried.

On September 18, 1973, the plaintiff filed a document entitled "INTERLOCUTORY APPEAL" with the clerk of this

court for Suffolk County alleging the facts stated above and asking that the court declare that the "Massachusetts two-trial de novo procedure . . . [violates] Article XII of the Massachusetts Constitution and the Fifth, Sixth, and Fourteenth Amendment[s] of the United States Constitution," and that it "enjoin the Commonwealth from further prosecuting the complaint initiated in the District Court."[1] The latter request was denied by the single justice on November 8, 1973, and the plaintiff excepted thereto. On December 10, 1973, the Commonwealth filed an answer admitting all of the facts alleged in the plaintiff's petition. On January 11, 1974, a single justice of this court, acting at the request of the parties, reserved and reported the case without decision to the full court for its determination on the pleadings.

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[1] On September 20, 1973, the plaintiff filed a motion in the Superior Court requesting that the complaint which was the subject of the appeal be dismissed. An examination of the docket entries in that appeal indicates that the motion had not been acted on up to the date of argument before the full court in the present case.

Questions of Procedure and Standing.

We are confronted at the outset with several serious questions concerning the procedure by which the plaintiff seeks to raise the important issue of the constitutionality of this Commonwealth's two-tier court system and his standing to do so in the particular circumstances of this case.

1. Purported Interlocutory Appeal. Despite the plaintiff's designation of his petition as an "INTERLOCUTORY APPEAL," it is not such in fact or in law. The only interlocutory appeal available to a defendant in a criminal case in this Commonwealth is that provided by G. L. c. 278, § 28E, inserted by St. 1967, c. 898, § 1. That statute permits a defendant "in a felony case" to make application to the Chief Justice or to a single justice of this court for leave to take "an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial." This case does not come within the quoted statutory language, first, because it involves a misdemeanor and not a felony, and, second, because there has been no "decision, order or judgment of the superior court" on a "motion to suppress evidence."

2. Relief under G. L. c. 211, § 3. The first paragraph of the plaintiff's petition states that the jurisdiction of this court is invoked pursuant to G. L. c. 211, § 3 (as amended by St. 1956, c. 707, § 1),[2] which provides in part that this court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided" (emphasis supplied). We have indicated in a number of decisions that our power under this statute should be used sparingly, and that it should rarely be used in a case where some other practical remedy is available. In Barron v. Barronian, 275 Mass. 77, 80 (1931), we characterized a request for relief under this statute as a request "for extraordinary intervention." In Gilday v. Commonwealth, Mass. (1971),[a] we said: "Only in the most exceptional circumstances will we review interlocutory rulings in criminal cases under our general superintendence powers," and we there exercised the power to avoid an error which "might be irremediable, and possibly not curable even by a new trial since the defendants could not thereafter be placed in statu quo." Id. at [b]

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[2] See St. 1973, c. 1114, § 44, effective July 1, 1974, amending § 3 as part of a statutory revision to conform the General Laws to the new Massachusetts Rules of Civil Procedure, also effective July 1, 1974.

[a] Mass. Adv. Sh. (1971) 1349.

[b] Id. at 1350.

In Myers v. Commonwealth, Mass. , (1973),[c] and in Corey v. Commonwealth, Mass. , (1973),[d] we repeated the language quoted above from the Gilday case and then exercised our extraordinary power under § 3 to insure the proper conduct of probable cause hearings in the District Courts on complaints against Myers and Corey before they could be prosecuted in the Superior Court.

A comparison of the facts of the present case with those of the very few cases in which we have exercised our extraordinary powers under G. L. c. 211, § 3, to give relief with respect to interlocutory rulings in criminal cases leads us to conclude that this is not an instance where such relief should be granted.

(a) This is not a case where "no other remedy is expressly provided." The constitutional issue the plaintiff now asks us to decide is the same issue which he raised in the District Court, and in the Superior Court by his motion to dismiss.[3] If his motion were denied, and if he were thereafter tried in the Superior Court and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto. The single justice properly

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[c] Mass. Adv. Sh. (1973) 1045, 1046.

[d] Mass. Adv. Sh. (1973) 1237, 1238.

[3] See fn. 1, supra.

refused to stay proceedings in the Superior Court for the purpose of enabling the plaintiff to argue before the full court that he had no other remedy. The fact that the plaintiff's constitutional claims could be rendered moot if he were acquitted in the Superior Court would not, in our opinion, prejudice him in such a manner as to warrant the exercise of our "extraordinary" powers of review under G. L. c. 211, § 3. Barber v. Commonwealth, 353 Mass. 236, 239 (1967).

(b) In challenging the two-tier court system, one of the plaintiff's principal arguments is that it denies him the right to a speedy trial in violation of the Sixth Amendment to the United States Constitution. He appears to argue that this right is violated both by the requirement for an initial nonjury trial to a judge in the District Court and by the fact that even apart from the District Court proceeding "the time schedule in the Superior Court for [jury] trial of misdemeanors and less serious felonies is deplorable." The circumstances of this case suggest, however, that the plaintiff is in no position to raise this speedy trial claim. The plaintiff was tried in the District Court on September 6, 1973, within fifteen days after his arrest. His appeal taken on that date

was entered in the Superior Court on September 10, 1973. The plaintiff then elected to proceed before the single justice of this court rather than to let his appeal take its course in the Superior Court. When that appeal was reached for trial in the Superior Court on November 15, 1973, he requested that the case not be tried because of his petition pending before the single justice, and when the case was reached again in the Superior Court on March 6, 1974, he did not appear and was defaulted. He has never taken any action in the Superior Court to assert his right to speedy trial. The plaintiff's conduct at all stages of the proceedings indicates that either he or his counsel, or both, have adopted the strategy of delaying a jury trial in favor of their attempts to obtain an interlocutory ruling on the constitutional question they seek to test.

3. Motion to Dismiss Petition. When this case was reached for argument before the full court, the Commonwealth offered and argued a motion that the plaintiff's petition be dismissed because of his failure to appear in the Superior Court when his case was called for trial on his appeal on March 6, 1974, and his resulting default which continued at the time of the argument. As noted above, on filing the present petition the plaintiff had requested a stay of further proceedings on the

complaint against him and the stay was denied. He was therefore required to appear for trial of his appeal when it was called in the Superior Court on March 6, 1974. The filing and pendency of his petition in the present case did not relieve him from the obligation to appear. It is not within his power to decide unilaterally that he will prosecute this civil action and, while doing so, fail, neglect or refuse to appear for trial in the Superior Court when required to do so. Under the terms of G. L. c. 278, § 18, on taking his appeal to the Superior Court he was released on personal recognizance "with condition to appear at the superior court on said return day [of the appeal] and at any subsequent time to which the case may be continued . . . and so from time to time until the final sentence, order or decree." He has violated that obligation and he is therefore not entitled to the review of interlocutory questions he now seeks. "By his voluntary act, which renders him unavailable to await the decision of the court, he has waived appellate rights." Commonwealth v. Rezendes, 353 Mass. 228 (1967). Commonwealth v. Richards, 1 Mass. App. Ct. (1973).[e]

4. Conclusion. On the basis of our discussion above we conclude as follows: (a) that the petition in this case cannot be maintained as an application for an interlocutory appeal, (b) that it cannot be maintained as a petition for the exercise

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[e] Mass. App. Ct. Adv. Sh. (1973) 390.

of this court's extraordinary powers under G. L. c. 211, § 3, and (c) that by reason of his failure to appear for trial when his case was called in the Superior Court the plaintiff is not entitled to any appellate relief from this court even if such relief were otherwise available to him.

The Plaintiff's Constitutional Claims.

Although for reasons already discussed the plaintiff is not entitled to relief in this case, we think that in view of the nature of the question which he attempted to raise and in view of the fact that the plaintiff's counsel appears determined to raise the same question in other cases,[4] we

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[4] The following are several other cases in which the plaintiff's counsel has raised substantially the same constitutional question which he is raising in the present case:

(1) Scheller v. Burke, Civil Action No. 73-428-G (D. Mass.), affirmed on January 3, 1974, by the United States Court of Appeals (1st Cir.) No. 73-1296.

(2) Corcoran v. Hedges, Civil Action No. 73-91-M (D. Mass.); appealed to the United States Court of Appeals (1st Cir.) No. 73-8074, and decided on January 4, 1974, by the following MEMORANDUM AND ORDER:

> "Present counsel, representing various clients, seems determined to find a way to attack the Massachusetts so-called two tier system of criminal trials in the federal court without having to do so first in the state court. We decline to speculate on the anticipated advantages, if any, but we repeat that we are totally unsympathetic in the absence of convincing reasons.
>
> "Absent undue delay the federal courts will not step in where procedures, available in the state court to raise the issues presented, are not pursued. Our ears are particularly closed when a party allegedly desiring speed, seeks it expeditiously in one area and not in another.

ought, as was done in Wellesley College v. Attorney Gen. 313 Mass. 722, 731 (1943), to express briefly our opinion upon the constitutional question that has been argued. Simeone Stone Corp. v. Board of Appeals of Bourne, 345 Mass. 188, 192 (1962). Harvard v. Maxant, Mass. , (1971).[f] Karchmar v. Worcester, Mass. , (1973).[g]

1. Sixth Amendment Claims. The plaintiff argues that our two-tier court system, under which he was first placed on trial before a District Court judge and then required to appeal to the Superior Court if he desired a trial de novo before a jury, violates the trial by jury and speedy trial provisions of the Sixth Amendment.[5] We have concluded above that on the facts of this case the plaintiff's argument relating to his right to a speedy trial is without merit and

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> "The request for a certificate of probable cause is denied."

(3) Almeida v. Lucey, 372 F. Supp. 109, 111 (D. Mass. three-judge court, 1974), app. pending.

(4) Whitmarsh v. Commonwealth, No. 73-183 (Equity), Supreme Judicial Court for the county of Suffolk.

(5) Costarelli v. Buckley, No. 74-168 (Law), Supreme Judicial Court for the county of Suffolk.

[f] Mass. Adv. Sh. (1971) 1601, 1605.

[g] Mass. Adv. Sh. (1973) 1223, 1234-1235.

[5] The pertinent language of the Sixth Amendment is: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

we will not discuss the claim further here. See Barker v. Wingo, 407 U. S. 514, 530-533 (1972).[6] What must still be considered is whether, as the plaintiff asserts, the two-tier court system violates a right of an accused purportedly guaranteed by the Sixth Amendment to have a jury trial "in the first instance." It is this assertion which is at the core of the plaintiff's constitutional challenge to that system.

This court has not heretofore considered the question whether our two-tier court system in and of itself violates the jury trial requirement of the Sixth Amendment[7] but it has considered the question in relation to the similar requirement included in art. 12 of the Declaration of Rights of the Massachusetts Constitution: "And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and the navy, without trial by jury."[8]

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[6] The Supreme Court identified in that case several factors which courts should assess or weigh when considering a claim of denial of the right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. at 530. In the circumstances of the case before us it is clear that none of these factors can or should be weighed in favor of the plaintiff.

[7] In Mann v. Commonwealth, 359 Mass. 661, 667 (1971) (Mass. Adv. Sh. [1971] 1027, 1032-1033), we briefly considered the more limited question whether "the imposition of a greater sentence after a de novo trial unconstitutionally burdens . . . [a criminal defendant's] right to a jury trial," but there is no indication in the case whether Mann's contention that it did so was based on the Sixth Amendment or on art. 12 of the Massachusetts Declaration of Rights.

[8] The full text of that part of art. 12 relevant to this case reads as follows: "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his

In Jones v. Robbins, 8 Gray 329 (1857), in which the principal question involved was whether a person could be sentenced to State prison without a grand jury indictment, the court said: "The last clause [of art. 12], which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a 'capital' or 'infamous punishment,' . . . is somewhat more explicit than the preceding clause, 'judgment of his peers,' and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains

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life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court . . .. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury." Id. at 341-342. In the more than 100 years since Jones v. Robbins was decided, we have never questioned this conclusion. See Mann v. Commonwealth, Mass. , - (1971);[h] Commonwealth v. Britt, Mass. , (1972).[i]

The plaintiff concedes that this court has considered, and continues to consider, the two-tier court system as satisfying the applicable constitutional requirements of art. 12 of the Declaration of Rights. He argues, however, that the Sixth Amendment has traditionally been held to secure a criminal defendant in the Federal courts, other than one charged with a "petty offence," the right to a jury trial "from the first moment, and in whatever court, he is put on trial for the offence charged," Callan v. Wilson, 127 U. S. 540, 557 (1888), and that whatever the Sixth Amendment requires by way of a jury trial in the Federal system is now made applicable to the States through the Fourteenth Amendment.

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[h] Mass. Adv. Sh. (1971) 1027, 1032-1033.

[i] Mass. Adv. Sh. (1972) 1443, 1447.

In Callan v. Wilson, supra, involving a criminal prosecution in the District of Columbia, the court said at p. 557: "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name [of], or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution"(emphasis supplied). It is clear from the italicized language that this decision, when rendered, was intended to apply only to Federal prosecutions and not to State prosecutions. In reaching its decision the court noted the contrary language in Jones v. Robbins, 8 Gray 329, 341 (1857), but elected not to follow it, an action which did not affect the validity of this court's interpretation of the Massachusetts Constitution in the Jones case.

As the plaintiff points out, however, in Duncan v. Louisiana, 391 U. S. 145, 149 (1968), the Supreme Court held that the due process clause of the Fourteenth Amendment made applicable to the States the jury trial provision of the Sixth Amendment: "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." Yet an examination of the concurring and dissenting opinions in that case indicates that the question immediately arising among the Justices was whether the court's holding meant or should mean that all prior decisions of the Federal Courts interpreting the jury trial provision of the Sixth Amendment would be applicable in all respects and details to the States as well, a question to which the opinion of the court, written by Mr. Justice White, had given an ambiguous response in a footnote.[9]

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[9] 391 U. S. at 158-159, fn. 30, which states in pertinent part: "Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, Thompson v. Utah, 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, Maxwell v. Dow, 176 U. S. 581, 586 (1900); and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by de novo trial with a jury, Callan v. Wilson, 127 U. S. 540, 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court" (emphasis supplied).

Thus, Mr. Justice Black, with whom Mr. Justice Douglas joined, wrote in his concurring opinion: "The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also

guaranteed by the Fourteenth Amendment to defendants tried in state courts. . . . I am very happy to support this selective process through which our Court has . . . held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government." Id. at 162-164. On the other hand, Mr. Justice Fortas, in his concurring opinion, expressed an opposing point of view: "But although I agree with the decision of the Court, I cannot agree with the implication, see . . . [391 U. S.] at 158-159, n. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental — that they are not essential to due process of law — and that they are not obligatory on the States. . . .

There is no reason whatever for us to conclude that . . . we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. . . . The Due Process Clause . . . does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States." Id. at 213-214.[10] Mr. Justice Harlan, with whom Mr. Justice Stewart joined, wrote a dissenting opinion in which he stated: "[The Court] holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases — including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts." Id. at 172. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored." Id. at 181.

There are numerous later statements by various Justices of the Supreme Court in a series of concurring and dissenting opinions on the question whether all Sixth Amendment Federal jury requirements are or are not, or should or should not be, applicable in their entirety to State criminal trials.

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[10] Mr. Justice Fortas's concurring opinion also applied to Bloom v. Illinois, 391 U. S. 194 (1968), and actually follows the court's opinion in that case.

See Bloom v. Illinois, 391 U. S. 194, 211, 213-214, 215 (1968); Baldwin v. New York, 399 U. S. 66, 74, 76-77 (1970); Williams v. Florida, 399 U. S. 78, 86, 102-103, 106, 122-123, 130-133, 136-138, 143 (1970); Johnson v. Louisiana, 406 U. S. 356, 369, 375, 388, 395-396 (1972); Apodaca v. Oregon, 406 U. S. 404, 406, 410-411, 414-415 (1972). See also Codispoti v. Pennsylvania, U. S. , , (Rehnquist, J., dissenting) (1974).[j] However, no useful purpose would be served by any tabulation of the position which each of the Justices took in any or all of the cases in which this subject was discussed. A reading of all the cases suggests to us that the meaning of the Sixth Amendment's jury trial provision — and perhaps also the specific instances of its application to the States — continues to be in flux. In both Williams v. Florida, supra, and Apodaca v. Oregon, supra, for example, the Supreme Court rejected what had been traditional interpretations of the Sixth Amendment jury trial provision in the Federal Courts by holding that that clause did not require as a constitutional matter in State or Federal Courts either a twelve person jury or a unanimous verdict of guilty in certain serious criminal cases. In doing so the court in effect reversed several of its prior cases. See, e.g., Thompson v. Utah, 170 U. S. 343 (1898); Maxwell v. Dow,

[j] (June 26, 1974) 42 U. S. L. Week 5175, 5177, 5189.

176 U. S. 581, 586 (1900); Andres v. United States, 333 U. S. 740, 748-749 (1948). Cf. Duncan v. Louisiana, supra, at 158-159, n. 30, set forth in fn. 9 above.

It is clear that the Supreme Court is aware of the existence in several States of two-tier court systems such as we have in Massachusetts for the trial of less serious criminal offences, as the cited footnote from the Duncan case indicates. See Williams v. Florida, 399 U. S. 78, 137, 139, 141-143 (Harlan J., concurring in result) (1970); Colten v. Kentucky, 407 U. S. 104, 113-114 (1972). Indeed, in the Colten case, id. at 112-120, the court examined such systems at some length, setting forth the justifications for them offered by the States (id. at 114), and discussing what apparently was its own view of their advantages (id. at 118-119).[11] In light of these cases and of the highly

[11] "We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy . . .. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. . . . The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence

uncertain state of the law on the subject, we do not believe that we are required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance for all criminal offences, Callan v. Wilson, 127 U. S. 540 (1888), [12] or (b) that even if that court did reaffirm this rule of the Callan case with respect to the Federal Courts, it would apply such a requirement in equal fashion to the States. In sum, we believe that the Commonwealth's two-tier court system satisfies the jury trial requirement of the Sixth Amendment as applied to the States through the Fourteenth Amendment.[13]

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imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial de novo system, as such, is unconstitutional."

[12] We note that although this holding of Callan v. Wilson, supra, has been cited by the Supreme Court in a few of the opinions discussed above, the court has not indicated any opinion, either affirmative or negative, about it. See Duncan v. Louisiana, supra, at 158-159, fn. 30; Williams v. Florida, 399 U. S. 78, 137 (1970) (Harlan, J., concurring in judgment).

[13] See Almeida v. Lucey, 372 F. Supp. 109, 111, 112-113 (Tauro, J. dissenting) (D. Mass. three-judge court, 1974), app. pending.

We are aware that in State v. Holliday, 109 R. I. 93, 103-104 (1971), the Supreme Court of Rhode Island reached the opposite conclusion from ours, but for the reasons discussed above we do not agree with that court's opinion. Cf. Manns v. Koontz, 451 F. 2d 1344, 1345 (4th Cir. 1971); Manns v. Commonwealth, Va. (1972) (191 S. E. 2d 810 [1972]). See Lombleux v. Robbins, 414 F. 2d 353, 355-356 (1st Cir. 1969), cert. den. 397 U. S. 1017 (1970).

2. Fifth Amendment Claim. The plaintiff also contends that the two-tier court system violates the double jeopardy clause of the Fifth Amendment, made applicable to the States through the Fourteenth. Benton v. Maryland, 395 U. S. 784 (1969). The principal thrust of his argument relates to the possible imposition of a higher sentence by the Superior Court in a de novo trial held on an appeal from the District Court: he claims first that this "threat of enhanced penalty" in the Superior Court "chills" a defendant's right to take an appeal, and, second, that the mere existence of authority in the Superior Court judge to impose a greater sentence in itself constitutes a violation of the double jeopardy clause.

The plaintiff's argument is not new to this court. In Mann v. Commonwealth, 359 Mass. 661 (1971),[k] the same contentions of "chilling effect" (which is essentially a claim of denial of due process more than of violation of the double jeopardy clause) and enhanced penalty were raised and were resolved against the plaintiff's contention. Id. at - , - .[l]

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[k] Mass. Adv. Sh. (1971) 1027.

[l] Id. at 1028-1030, 1031-1033.

See Lemieux v. Robbins, 414 F. 2d 353, 354-356 (1st Cir. 1969), cert. den. 397 U. S. 1017 (1970) (Maine two-tier court system).[14] The plaintiff suggests these decisions should not control here because both courts incorrectly relied on North Carolina v. Pearce, 395 U. S. 711 (1969), with respect to the double jeopardy claims raised in the cases before them; it is the plaintiff's position that the Pearce case, which involved the resentencing of a defendant who had perfected a successful appeal and had been retried and ultimately reconvicted, is entirely distinguishable from the case at bar. We believe, however, that Colten v. Kentucky, 407 U. S. 104 (1972), has rejected that position.

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[14] As we said in the Mann case, Mass. at , (1971) (Mass. Adv. Sh. [1971] 1028-1029, 1030): "The petitioner complains that the [two-tier de novo] procedure has a chilling effect on his right of appeal. 'In answering this question we must have in mind that a defendant gives up nothing by going to trial in the district court. . . . Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of. . . . The state's two step procedure has a legitimate purpose.' Lemieux v. Robbins, . . . [supra, at] 355-356. . . . [T]he reasoning in the Lemieux case is applicable to the instant case. A defendant not only 'gives up nothing by going to trial in the district court' but he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own. If he is found guilty he can appeal. If he is found not guilty that is the end of the case because 'double jeopardy' precludes an appeal by the State."

In the Colten case the defendant was tried, convicted and fined for disorderly conduct before an inferior court without a jury pursuant to the Kentucky two-tier court system for less serious criminal offences. He exercised his right to "appeal" to a higher court for a trial de novo before a jury, at which trial he was again convicted and a higher fine was imposed. Like the plaintiff in the case before us, he argued that the State two-tier court system was constitutionally "infirm" because of the judge's power to impose a higher sentence in the second-tier trial, basing his argument in part on the Fifth Amendment's double jeopardy clause. The Supreme Court briefly disposed of his claim: "Colten's alternative contention is that the double jeopardy clause prohibits the imposition of an enhanced penalty upon reconviction. The Pearce Court rejected the same contention in the context of that case, 395 U. S., at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in Pearce, where reversal of the first conviction was for constitutional error." 407 U. S. at 119.

Despite the plaintiff's assertions to the contrary, it seems clear that the Colten case is indistinguishable from the case before us and that its rejection of the double jeopardy claim governs here.

Disposition.

In accordance with the conclusion reached in par. 4 of the first section of this opinion, an order is to be entered by the single justice dismissing this petition.

So ordered.

Supreme Court, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI, APPELLANT

v.

MASSACHUSETTS, APPELLEE

APPEAL FROM THE MUNICIPAL COURT OF THE CITY OF BOSTON

FILED MAY 20, 1973
PROBABLE JURISDICTION NOTED OCTOBER 21, 1974

In the Supreme Court of the United States

OCTOBER, 1974

No. 73-6739

STEVEN COSTARELLI, APPELLANT

v.

MASSACHUSETTS, APPELLEE

APPEAL FROM THE MUNICIPAL COURT OF THE CITY OF BOSTON

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Chronological List of Relevant Docket:	
Docket Entries	4A
Criminal Complaint	5A
Defendant's Motion for Jury Trial	6A
Judgment	7A
Notice of Appeal to United States Supreme Court	8A
Order of the Supreme Court of the United States postponing jurisdiction to the hearing of the case on the merits	10A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 23, 1974—Complaint Issued in Municipal Court for the City of Boston.
January 23, 1974—Defendant pleaded not guilty.
February 6, 1974—Motion for Jury Trial filed.
February 27, 1974—Trial on complaint.
February 27, 1974—Motion for Jury Trial denied.
February 27, 1974—Defendant found guilty and sentenced to one year in House of Correction.
February 27, 1974—Defendant exercised his right of appeal for a trial de novo in the Superior Court.
May 20, 1974[1]—Notice of Appeal to United States Supreme Court filed.

[1] This is an approximate date as no date of receipt is recorded in the records of the Boston Municipal Court for the City of Boston.

3 TO THE JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said City of Boston for the transaction of criminal business, within the County of Suffolk, Richard Tracy of the City of Boston in the County of Suffolk, in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that Steven Costarelli of said City of Boston, on the twenty seventh day of November in the year of our Lord one thousand nine hundred and seventy-three at the City of Boston aforesaid, and within the judicial district of said Court, upon a certain public way there situate called Albany Street, (Emergency Parking Lot of the Boston City Hospital) did then and there use a certain motor-vehicle, to wit, an automobile the property of Leroy Taylor, the said Costarelli then and there well knowing such use of said automobile by him said Costarelli to be unauthorized against the peace of said Commonwealth and the form of the statute in such case made and provided.

(S) RICHARD TRACY

SUFFOLK. TO WIT:

TAKEN AND SWORN TO, this twenty-third day of January in the year of our Lord one thousand nine hundred and seventy-four.

BEFORE SAID COURT.

(S) JOHN P McCOOLE.
Assistant Clerk.

4 Commonwealth of Massachusetts

SUFFOLK, ss: BOSTON MUNICIPAL COURT # -- CRIMINAL

(Unauthorized use of auto Ch. 90, Sec. 24,
trial date Feb. 6, 1974)

COMMONWEALTH OF MASSACHUSETTS

v.

STEVEN COSTARELLI

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, *Callan* v. *Wilson*, 117 U.S. 540, *Duncan* v. *Louisiana*, 391 U.S. 145, fn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, *Klopfer* v. *North Carolina*, — U.S. ——, *Holliday* v. *State*, 280 A. 2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, *Benton* v. *Maryland*, 89 S. Ct. 2056, *United States* v. *Jorn*, 400 U.S. 470.

By his attorney,

ROBERT W. HAGOPIAN, *Esq.*,
Wrentham, Mass. 02093.

Clerk's Note:

The following stamps appear on the back of the original paper:

Feb 6 9:28 A.M. '74
Feb 27 1974 Motion Denied

5 1974 493

Commonwealth

On Complaint of

Richard Tracy

v.

Steven Costarelli

February 27, 1974

Motion Denied

FOUND GUILTY

House of Correction 1 [year] N.R.A.

Appeal $100 Sup. Ct.

1st. Monday of March

DeGuglielmo

6 Commonwealth of Massachusetts

SUFFOLK, ss

MUNICIPAL COURT OF
THE CITY OF BOSTON
CRIMINAL 493

COMMONWEALTH OF MASSACHUSETTS

v.

STEVEN COSTARELLI

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Steven Costarelli, the appellant above named hereby appeals to the Supreme Court of the United States from the conviction of the Municipal Court of the City of Boston on February 27, 1974. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

ROBERT W. HAGOPIAN, *Esq.*,
Wrentham, Mass. 02093.

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies that he has served a copy of the above Notice of Appeal on Arthur Murphy, Boston Police Prosecutor, by mailing a copy of same first class, postage prepaid, Boston Police
77 Department Station Four, Berkeley Street, Boston on May 16, 1974.

ROBERT W. HAGOPIAN, *Esq.*,
Wrentham, Mass. 02093.

Supreme Court of the United States

No. 73–6739

STEVEN COSTARELLI, *Appellant*

v.

MASSACHUSETTS

APPEAL from the Municipal Court of the City of Boston of the Commonwealth of Massachusetts.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 21, 1974.

U.S. GOVERNMENT PRINTING OFFICE 1974

Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-6739.

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON.

Appellee's Motion to Dismiss.

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,
131 Tremont Street,
Boston, Massachusetts 02111.

JOHN J. BONISTALLI,
Legal Intern to the
Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-6739.

STEVEN COSTARELLI,
APPELLANT,
v.
COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON.

Appellee's Motion to Dismiss.

Appellee, pursuant to Rule 16(1)(a) of the Rules of this Court, moves this Honorable Court to dismiss the appeal for failure of jurisdiction.

Opinion Below.

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

Jurisdiction.

Appellant was convicted on February 27, 1974, in the Municipal Court of the City of Boston, and notice of appeal was filed in that court on May 16, 1974. The jurisdictional statement to this Court was filed on August 16, 1974. The appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Question Presented.

Whether appellant's conviction in the Municipal Court of the City of Boston is a "final judgment" rendered by the "highest court" of Massachusetts within the meaning of 28 U.S.C. § 1257.

Statement of the Case.

On February 27, 1974, the defendant was charged in the Municipal Court of the City of Boston with the crime of unauthorized use of a motor vehicle in violation of Mass. Gen. Laws, c. 90, § 24. Appellant filed a motion for a jury trial in the Municipal Court which was denied. The Commonwealth presented its evidence and rested. The appellant, then defendant, chose to remain silent and presented no witnesses. The appellant was found guilty of unauthorized use of a motor vehicle. The appellant, on May 16, 1974, filed a notice of appeal in the Boston Municipal Court.

Argument.

In Massachusetts a defendant, properly within the jurisdiction of the Municipal Court, cannot waive a trial at the

Municipal Court level; he can, however, avoid a trial by admitting a finding of guilt and appealing; or, he can listen to the Commonwealth's evidence and rest, and then appeal, if found guilty, which is what the appellant did in the instant case.

Upon appeal, "It is reasonable to conclude that the legislature intended that . . . the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial."* *Mann* v. *Commonwealth,* Mass. Adv. Sh. (1971) 1027, 1030, 271 N.E. 2d 331, 333.

The appellant's appeal from the Municipal Court judgment "wipes out the lower court action entirely." *Mann* v. *Commonwealth,* Mass. Adv. Sh. (1971) at 1032, 271 N.E. 2d at 335. Both the finding of guilt and the sentence imposed were virtually erased by appellant Costarelli's appeal to the Massachusetts Superior Court on May 16, 1974. Thus, the finding and sentence of the Municipal Court have no force and effect for any purpose upon a judge of the Massachusetts Superior Court, much less of the United States Supreme Court, for purposes of an appeal based upon 28 U.S.C. § 1257. From the Superior Court, the appellant, pursuant to Mass. Gen. Laws, c. 278, § 28, and c. 211A, §§ 10, 11, may also have the customary appeal to the Massachusetts Appeals Court and, in some cases, review by the full bench of the Supreme Judicial Court for the Commonwealth. Therefore, the decision of the Municipal Court is not from a court of last resort; moreover,

---

* See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). In Massachusetts the defendant may do this in two ways; if found guilty of certain misdemeanors in selected District Courts, he may appeal and claim a trial by jury of six at the District Court level. St. 1964, c. 656 *et seq.* He may also appeal to a twelve-man jury in the Superior Court pursuant to Mass. Gen. Laws, c. 212, § 6, and c. 278, § 18.

it is not a final judgment rendered "by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257.

The jurisdiction of this Court to review a state court judgment is confined by 28 U.S.C. § 1257 to a judgment which is final. It must be final in two senses:

> "[I]t must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 548, 551 (1945).

See *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.,* 344 U.S. 178, 180 (1952).

In the instant case, while the judgment is not subject to further review, it is eradicated by the appellant's appeal. Furthermore, the appellant was found guilty in the Municipal Court and, having exercised his right to appeal, the litigation that transpired in the Municipal Court can only be considered as an intermediate step in determining the appellant's guilt or innocence. Therefore, the decision in the Municipal Court, finding appellant guilty, cannot be considered a "final judgment" from the "highest" court available to him in Massachusetts.

The decisions cited by the appellant in his jurisdictional statement (p. 3) allegedly sustaining the jurisdiction of the Supreme Court in this matter are inapposite. The appellants in those cases had no further right of appeal and jurisdiction was sustained upon the ground that each appeal came from the highest court of the state of the case.

Conclusion.

For the reasons stated, it is respectfully suggested that the appeal be dismissed for failure of jurisdiction.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,
131 Tremont Street,
Boston, Massachusetts 02111.

JOHN J. BONISTALLI,
Legal Intern to the
Attorney General.

Supreme Court, U. S.
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STEVEN COSTARELLI,

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ON APPEAL FROM THE MUNICIPAL COURT
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BRIEF FOR THE APPELLANT

ROBERT W. HAGOPIAN, ESQ.
Wrentham, Mass. 02093

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IN THE

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OPINION BELOW

No opinion, findings of facts, or conclusions of law were reported by the Municipal Court of the City of Boston.

JURISDICTION

On February 27, 1974, Steven Costarelli was charged in the Municipal Court of the City of Boston with using a motor vehicle without authority and knowing such use to be unauthorized, an offense set out in G.L. Ch. 90 Sec. 24(2)(a), and carrying a maximum possible sentence of a $500 fine and two years imprisonment. At the beginning of the proceeding, Steven Costarelli duly moved the trial court in writing for a trial by jury in the first instance, asserting specifically his constitutional rights to same under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. The trial court denied this motion.

Thereupon, Steven Costarelli was found guilty by the trial judge and sentenced to one year imprisonment. From the judgment of the Municipal Court, Steven Costarelli "appealed" to the Superior Court for a trial de novo and concurrently brought this appeal to this Court. This Court postponed the issue of jurisdiction for further consideration.

Jurisdiction over this appeal is predicated on 28 U.S.C.1257(2) which grants review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, . . ." The jurisdictional question at hand, then, is whether the sentence imposed by the Municipal Court for the City of Boston is a final judgment of a highest state court.

In Massachusetts there is no procedure for obtaining *direct* appellate review of a conviction in a municipal or district court.[1] A defendent has a right of "appeal" for

[1]The municipal and district courts of Massachusetts comprise the first tier of Massachusetts' two-tier structure. For purposes of this appeal, they are equivalent courts.

a trial de novo by jury in the superior court, the second tier in Massachusetts' two-tier criminal procedure. However, a trial de novo in the superior court is a new trial and not a remedy for reviewing the proceedings in the lower court.

Alternatively, if a defendant does not "appeal" his conviction to the superior court, he may obtain collateral review of any jail sentence imposed by way of a petition for writ of habeas corpus.[2] This remedy is a collateral remedy and not a method of review prerequisite to this Court's jurisdiction under 28 U.S.C. 1257(2):

> The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to appellant. *Largent v. Texas,* 318 U.S. 418, 421-22 (1943).

Although the Commonwealth has not raised them and rightly so, there are two other indirect remedies for attacking criminal onvictions in Massachusetts. The first is the writ of error.[3] Like the writ of habeas corpus, this is a collateral remedy, and not a means of *direct* review:

> The writ of error does not bring into the Supreme Judicial Court the original case. That remains in the court in which it went to judgment. *Lee v. Fowler,* 263 Mass. 440, 443 (1922).

[2]G.L. Ch. 248 Secs. 1-40.

[3]G.L. Ch. 250 Secs. 1-2, 9-12.

> A writ of error is an original, independent action and in its origin and nature is distinguishable from appeals and bills of exceptions, which are continuations of the original action. *Commonwealth v. Marsino,* 252 Mass. 224, 227-228 (1925)

Quite apart from its collateral nature, the remedy does not lie to attack a criminal conviction in a district or municipal court:

> In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts. See G.L.C. 250 Sec. 9. It is reasonable to conclude that the legislature intended that, upon appeal, the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial. . . . We need not speculate whether convictions in the District Court resulted from error. . . . *Mann v. Commonwealth,* __Mass.__, 271 N.E.2d 331, 333 (1971).

The second remedy referred to above is a petition to the ~~Superior~~ Supreme Judicial Court pursuant to G.L. Ch. 211 Sec. 3 as amended by Ch. 1114, Sec. 44, of the Acts of 1973 which reads in relevant part:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

This remedy is distinct and collateral in nature. It is instituted by a summons and complaint as an original action, and is governed by the *Massachusetts Rules of Civil Procedure.*[4] Additionally, the Supreme Judicial Court has recently held that it does not have jurisdiction under the statute to review a judgment of a district or municipal court. More specifically, in *Whitmarsh v. Commonwealth,* __Mass.__, 316 N.E.2d 610, 612-613 (1974), the plaintiff Whitmarsh brought a petition pursuant to G.L. 211 Sec. 3 to challenge his conviction in a district court on the grounds that he was denied a jury trial in the first instance. In ruling on the jurisdictional issue, the Supreme Judicial Court held:

> The first paragraph of the plaintiff's petition states that the *jurisdiction* (emphasis supplied) of this court is invoked pursuant to M.G.L. Ch. 211 Sec. 3 which provides in part that this court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein *if no other remedy is expressly provided.*" (emphasis by the Court)
>
> . . . . .
>
> (a) This is not a case where "no other remedy is expressly provided."
>
> . . . . .
>
> *Conclusion* On the basis of our discussion above we conclude as follows: . . . (b) that it [the petition] cannot be maintained as a petition for the exercise of this court's extraordinary powers under M.G.L. Ch. 211 Sec. 3, ...

In light of the above, appellant submits that the judgment of the Municipal Court of the City of Boston

[4] This remedy is similar to the all writs statute, 28 U.S.C. 1651.

was not subject to any further *direct* appellate review, either discretionary or by right. Accordingly, that judgment is a "judgment . . . rendered by the highest court of a State in which a decision could be had . . ." within meaning of Sec. 1257(2). Indeed the Commonwealth concedes this point on p. 4 of its motion to dismiss: "In the instance case, while the judgment is not subject to further review . . ."

Lastly, on the issue of this Court's jurisdiction, the Commonwealth argues that the judgment of the Municipal Court of Boston is not a "final" judgment within the meaning of Sec. 1257. Its argument is two-fold. First, it maintains that since the appellant exercised his right for a trial de novo in the superior court "the litigation in the Municipal Court can only be considered as an intermediate step in determining the appellant's guilt or innocence," and "[t]herefore, the decision in the Municipal Court . . . cannot be considered a 'final judgment' . . ."[5] The short answer to this argument is that the judgment of the Municipal Court is "final" because there were no further steps left open to be taken in the proceedings in the Municipal Court. The sentence of one year imprisonment was the "final word"[6] of the Municipal Court of Boston.

The second contention by the Commonwealth is that appellant's "appeal" for a trial de novo in the superior court "eradicated" the judgment of the Municipal Court, and hence, "the finding and sentence of the Municipal Court have no force and effect for any

[5]See p. 4 of the Commonwealth's Motion to Dismiss.

[6]*Market Street Railway Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945).

purpose upon a judge of the Massachusetts Superior Court, much less of the United States Supreme Court, for purposes of an appeal based upon 28 U.S.C. Sec. 1257." The thrust here is that the judgment of the Municipal Court became mooted by appellant's "appeal" for a trial de novo.[7] The answer to this proposition is that the judgment is not moot under the state procedure, let alone from a federal viewpoint, *Sibron v. New York,* 392 U.S. 40, 50-58 (1968). For instance, the statute under which Steven Costarelli was convicted required the Registrar of Motor Vehicles of Massachusetts to revoke his driver's license for a minimum period of one year or until such time as his conviction was reversed on "appeal".[8] This action was restrained by district court judge Joseph Tauro and a three judge court has been convened to determine the constitutionality of this procedure, *Costarelli v. Lucey, Registrar of Motor Vehicles*, No. 941T, (D. Mass. 1974). Similarly, G.L. Ch. 278 Sec. 24 makes clear that the sentence imposed by the Municipal Court is quite viable:

> If the appellant fails to enter and prosecute his appeal [in the superior court] he shall be defaulted on his recognizance and the Superior Court may impose sentence upon him for the crime of which he was convicted [in the district or municipal court], as if he had been convicted in said court, and if he is not then in custody, may

[7]In the circumstances of this case it would be more accurate to characterize Steven Costarelli's "appeal" for a trial de novo as a protective appeal.

[8]G.L. Ch. 90 Sec. 24(2)(b), 2(c) (Br. App. 5a).

issue process to bring him into court to receive sentence.

Accordingly, it is submitted that the judgment of the Municipal Court of Boston is not moot and is a "final judgment . . . rendered by the highest court of a State in which a decision could be had" within the meaning of these words in 28 U.S.C. 1257(2).[9]

QUESTIONS PRESENTED

1. Is Massachusetts bound by the rule of *Callan v. Wilson,* 127 U.S. 540, guaranteeing a defendant a trial by jury in the first instance when charged with an offense carrying a possible maximum jail sentence in excess of six months?

2. Where a defendant is entitled to a trial by jury, does the interposition of a trial by magistrate before a trial by jury impose an unconstitutional burden on the defendant's Sixth Amendment right to a speedy trial?

3. Where the Sixth Amendment guarantees a trial by jury, do state de novo procedures which deny this right in the first instance violate the double jeopardy provisions of the Fifth Amendment?

---

[9]Subsection (2) of Section 1257 is applicable since the Municipal Court sustained the constitutionality of the state statutes in question by denying defendant's motion for a jury trial. In the motion (App. -4), the defendant specifically asserted his constitutional rights and the pertinent decisions of this Court which he alleged to establish his rights.

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws (ter. ed.) Ch. 263 Secs. 4 & 6, Ch. 218 Sec. 26, Ch. 278 Secs. 2, 18, 20 and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

On February 27, 1974, Steven Costarelli was charged in the Municipal Court for the City of Boston with using a motor vehicle without authority and knowing such use to be unauthorized, an offense set out in M.G.L. Ch. 90 Sec. 24(2)(a) carrying a maximum possible sentence of a $500 fine and two years imprisonment. At the beginning of the proceeding, Steven Costarelli duly moved the trial court in writing for a trial by jury in the first instance, asserting specifically his constitutional rights to one under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. The trial court denied this motion, Thereupon, the government placed its case in evidence and rested. Steven Costarelli did not testify or otherwise offer any evidence. The trial judge then found Steven Costarelli guilty and sentenced him to one year imprisonment. Appellant brings this appeal to reverse the conviction of the Municipal Court of Boston.

SUMMARY OF THE ARGUMENT

Massachusetts maintains a two-tier trial de novo criminal procedure. For most offenses the accused is brought to trial initially in the first tier, the district or municipal courts, where he is tried before a judge. He cannot obtain a trial by jury, but if he is dissatisfied with the judgment of the lower court, he may "appeal" to the second tier, the superior court, and obtain a trial de novo by jury. If the defendant is reconvicted in the superior court, he can obtain traditional appellate review of this conviction in the Massachusetts Appeals Court or Supreme Judicial Court.

In *Callan v. Wilson,* 127 U.S. 540, 557 (1888), this Court unanimously held that the right to trial by jury secured to the accused "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged." Eighty years later, in *Duncan v. Louisiana,* 391 U.S. 145, 149, 158 n. 30 (1968), this Court held that the Fourteenth Amendment guaranteed "a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee," and hence, by implication it bound Massachusetts to the rule of *Callan v. Wilson,* subject to the qualification in Justice White's n. 30 that the Court's decisions interpreting the Sixth Amendment were "always subject to reconsideration."

Appellant maintains that the essence of the rule of *Callan v. Wilson* is that the accused should not be put "to the burden of two trials if he wishes a jury verdict" and that the interposition of a trial by magistrate is an unconstitutional imposition on the exercise of the right

to trial by jury. The "burden" on the right to trial by jury includes the additional expense the accused must bear for a meaningless trial in the lower court, the embarrassment of being found guilty and "appealing", an additional bail bond premium, and the threat of an increased penalty upon reconviction in the second tier.

The burden of a district court trial cannot be circumnavigated. If the defendant remains silent and is convicted, collateral consequences, e.g. loss of one's driver's license, attach immediately and the unimpeached testimony of the government witnesses may be introduced against him in his trial de novo in the superior court should the witnesses become unavailable. Additionally, if the accused fails to "prosecute his appeal, he shall be defaulted on recognizance and the superior court may impose sentence upon him for the crime of which he was convicted." G.L. Ch. 278 Sec. 24.

In addition to being a burden on the right to trial by jury, the interposition of a trial by magistrate runs counter to the "purpose" of the right to trial by jury, namely, to protect the accused from government oppression, such as the unnecessary burdens set out above, and to interpose "between the accused and his accuser . . . the commonsense judgment of a group of laymen." From this it follows that the rule of *Callan v. Wilson* is an essential element of the right to trial by jury in contradistinction to the unanimity for 12 man requirements which are "features" of a jury. As such, the rule should be left undisturbed.

Additionally, appellant maintains that Massachusetts has no more right to interpose a trial without a jury than it would to interpose a trial in which the accused was denied the right to counsel, or the right to remain silent, or the right to confront

witnesses. And it is no answer on Massachusetts' part to say that it offers the defendant a trial de novo with the full panolpy of Sixth Amendment procedural rights. *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Similarly, Massachusetts has no compelling state interest to deny the accused a trial by jury in the first instance as it may accomplish its purpose of saving judicial resources by maintaining a two-tier structure, but allowing a defendant the choice of proceeding in the first tier initially or a jury trial in the first instance in the second tier. See e.g. *Holliday v. State,* 109 R.I. 93, (1971).

Quite apart from infringing the right to trial by jury, the interposition of a trial by magistrate is an unconstitutional imposition on the right to a speedy trial. More specifically, the two-tier procedure is totally counterproductive in minimizing the "anxiety and concern of the accused." For the defendant who chooses to remain silent and insist upon his right to a jury trial, a trial in the district court is a meaningless proceeding which may "drain his financial resources". The imposition of a sentence amplifies anxiety, and the ordinary inference drawn from "appeal" generates a "cloud of suspicion." In short, two-tier trial de novo cuts away the roots of the speedy trial guarantee.

Lastly, appellant maintains that the two-tier de novo procedure violates the double jeopardy provisions of the Fifth Amendment. The heart of the double jeopardy guarantee is that the government, absent a "manifest necessity", should be limited "to a single criminal proceeding to vindicate its vital interest in enforcement of its criminal laws." Implicit in limiting the government to one crack at the accused is limiting it to a

proceeding which comports with sixth amendment standards.

ARGUMENT

I

THE JUDICIAL STRUCTURE OF MASSACHUSETTS' TWO-TIER TRIAL DE NOVO PROCEDURE

The first tier of Massachusetts' two-tier de novo system is comprised of the district and municipal courts. These courts have jurisdiction[10] over all misdemeanors and crimes having a possible prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess of five years.[11] Criminal proceedings in the district or municipal courts are commenced by the issuance of a complaint. If the defendant pleads guilty to the complaint at arraignment, he is sentenced by the district or municipal court. If he is dissatisfied by the sentence, he may "appeal."[12] the issue of his sentence

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[10]This jurisdiction is concurrent with the superior court, the second tier of the de novo procedure, M.G.L. 218 Sec. 26, (Br. App. 3a). Criminal proceedings may be initiated by either a complaint before a district or municipal court, or upon an indictment by a grand jury in the superior court, M.G.L. Ch. 263 Sec. 4 (Br. App. 1a). However, prosecution of crimes over which the district and superior courts have concurrent jurisdiction is almost always commenced in the district or municipal courts.

[11]M.G.L. Ch. 218 Sec. 26 (Br. App. 3a). See generally, Smith, *Massachusetts Criminal Practice and Procedure,* Sec. 44.

[12]M.G.L. Ch. 278 Sec. 18 (Br. App. 3a).

to the superior court, the second tier in the de novo procedure, but he is not entitled to a de novo trial in the superior court on his innocence or guilt, *Commonwealth v. Crapo,* 212 Mass. 209, 210 (1912).

If the defendant pleads not guilty, he is tried in the district or municipal court before a judge. He cannot obtain a trial by jury. If he is convicted he has a right of "appeal"[13] to the superior court, the second tier of the de novo procedure, where he may obtain a de novo trial by a jury[14] of twelve[15] unless he waives this right in writing,[16] in which case he will be tried by a judge. If a defendant fails to "prosecute his "appeal", he *shall* be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court," M.G.L. Ch. 278 Sec. 24 (Br. App. 1a) (emphasis added).

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[13]M.G.L. Ch. 278 Sec. 18 (Br. App. 3a).

[14]M.G.L. Ch. 278 Sec. 2 (Br. App. 2a).

[15]From a guilty finding in certain district courts, a defendant alternatively may "appeal" for a de novo trial by jury of six in the district court, or from a guilty finding in the Municipal Court of Boston, he may "appeal" for a twelve man jury in the Municipal Court of Boston. These jury trials "proceed in accordance with the provisions of law applicable to trials by jury in the superior court" and appellate review from any conviction is "in the same manner provided for trials by jury in the superior court." G.L. Ch. 218 Sec. 27A; G.L. Ch. 278 Sec. 18A. The only practical difference to these alternatives is that the time for obtaining a de novo jury trial in the district or municipal court is much shorter than in the superior court.

[16]G.L. Ch. 263 Sec. 6, (Br. App. 2a).

If a defendant is found guilty in the superior court, he may obtain, by right, appellate review of his conviction in the Massachusetts Appeals Court or the Supreme Judicial Court.[17]

II

THE SIXTH AMENDMENT JURY TRIAL GUARANTEE MEANS TRIAL BY JURY IN THE FIRST INSTANCE

One hundred and seventeen years ago Chief Justice Shaw of the Massachusetts Supreme Judicial Court concluded that the right to trial by jury did not mean trial by jury in the first instance, but only that the state must afford the defendant a jury trial at some time. More specifically, Chief Justice Shaw sustained Massachusetts' two-tier trial de novo procedure in *Jones v. Robbins,* 8 Gray 329, 341 (1857)[18] by holding:

> And we believe it [the right to a trial by jury] has been generally understood and practiced here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a

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[17]G.L. Ch. 278 Secs. 28, 31, 33A-33G.

[18]See also *Mann v. Commonwealth,* __Mass.__, 271 N.E.2d 331, 333 (1971)

> provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment to the court appealed to.

In reaching this result, Chief Justice Shaw was interpreting Article XII of the Declaration of Rights of the Massachusetts Constitution[19] guaranteeing that no law "shall subject any person to . . . infamous punishment . . . without trial by jury." However, the eminent Chief Justice noted that this clause was "equivalent" to the Sixth Amendment provision: " . . . in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . . "

Thirty one years later, in *Callan v. Wilson*, 127 U.S. 540 (1888), this Court reviewed the constitutionality of the District of Columbia's two-tier trial de novo procedure which was identical to the Massachusetts procedure.[20] In this case, Justice Harlan took note of *Jones v. Robbins* by citing at p. 553-4 the aforesaid quoted portion of Chief Justice Shaw's opinion, and then rejected its reasoning at p. 556-7:

> Except in the class or grade of offenses called petty offenses, . . . the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty

[19]The full text of Article XII is set out in Br. App. 1a.

[20]*Callan v. Wilson*, 127, U.S. 540, 551.

> by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirement of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

This decision, of course, was not binding upon Massachusetts. However, appellant submits that subsequent decisions of this Court have made the rule of *Callan v. Wilson*, applicable to the states.

III

DUNCAN V. LOUISIANA, 391 U.S. 145, (1968), BOUND THE STATES TO THE RULE OF CALLAN V. WILSON.

One hundred and eleven years after the decision of *Jones v. Robbins*, this Court in *Duncan v. Louisiana*, 391 U.S. 145, 149, (1968) made the Sixth Amendment applicable to the states:

> [W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee;

and at page 157-158:

> Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offences is a *fundamental right*, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. (emphasis added)

The State of Louisiana had argued against this holding, on the grounds that "if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment" including the guarantee for a twelve-man jury, the unanimous verdict requirement, and the rule of *Callan v. Wilson*, 127 U.S. 540. *In rejecting this assertion*, Mr. Justice White observed at p. 158-159 n. 30:

> It is very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. . . . Indeed, there appear to be only four States in which juries of fewer than twelve can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However ten states authorize first-state trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court.

The breadth of the majority opinion is made clearer by Mr. Justice Fortas in his concurring opinion at p. 213: "But although I agree with the decision of the Court, I

cannot agree with the implication, see ante, at 158-159, n.30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts." Likewise, Mr. Justice Harlan acknowledged the same in his dissent at p. 181:

> Consequently, the court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out'.

Duncan was followed by *Baldwin v. New York*, 399 U.S. 66 (1970) wherein five out of eight members of this Court "agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months."[21] Of the five members, three drew the demarcation line between "petty" and "serious" crimes at six months,[22] as is defined by common law[23] and in the federal system[24],

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[21] *Codispoti v. Pennsylvania*, ___U.S. ___, 41 LEd 2d 912, 919, n.4 (1974).

[22] Cf. *Callan v. Wilson*, 127 U.S. 540, 549, 556.

[23] Frankfurter & Corcoran, *Petty Federal Offenses and the Constitution Guarantee to Trial by Jury*, 39 Harv.L. Rev. 917, 934. (1926).

[24] 18 U.S.C. Sec. 1

and two held that the jury trial provisions of the Sixth Amendment were applicable to "all crimes".

Appellant submits that in light of *Duncan* and *Baldwin* he was entitled to a trial by jury in the municipal court as the maximum possible penalty under G.L. Ch. 90 Sec. 24(2)(a) was a $500 fine and two years imprisonment.[25] Alternatively, it should be observed that G.L. Ch. 90 Sec. 24(2)(b) & (c) requires the Registrar of Motor Vehicles to revoke the driver's license of a defendant who is convicted for using a motor vehicle without authority for a minimum period of one year or until his conviction is reversed upon "appeal" in the superior court. The loss of one's driver's license is a serious collateral consequence, *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930); *Parham v. Municipal Court*, ____ Iowa ____, 199 N.W.2d 50 (1972). Its revocation pursuant to G.L. Ch. 90 Sec. 24(2)(b) & (c) constitutes a criminal penalty since it is imposed for the commission of an act, i.e. using without authority, which is totally unrelated to the *operation* of a motor vehicle on the public ways or to the protection of the lives and safety of the public. As such this penalty was sufficient in itself to trigger the jury trial requirement under *Baldwin*:

> In extending the right to a jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business.* It must also include offenses which,

[25]Br. App. 5a.

> even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.
>
> *This does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime. *Baker v. City of Fairbanks*, Alaska , 471 P.2d 386, 401.[26]

In light of this contention, district judge Joseph Tauro has restrained the Registrar of Motor Vehicles from suspending Steven Costarelli's driver's license on account of his conviction in the Municipal Court of Boston by a magistrate, *Costarelli v. Lucey*, No. 941T, (D. Mass., 1974). Distinguishing *Almeida v. Lucey*, 372 F. Supp. 109, (D. Mass. 1974) affirmed ____ U.S. ____, (Oct. 15, 1974).

Subsequent to *Duncan* and *Baldwin*, state and lower federal courts have rendered conflicting opinions as to whether *Duncan* bound the states to the rule of *Callan v. Wilson*. The Supreme Court of Rhode Island answered

[26]See also *Keenan v. Board of Bar Examiners*, 317 F.Supp. 1350, 1360 (EDNC 1970) wherein Judge Craven notes that the loss of one's right to practice law is a penalty, Cf. *In re Winship*, 397 U.S. 358, 363-64, 367 (1970); *In re Gault*, 387 U.S. 1, 50; and *Frank v. United States*, 395 U.S. 147, 159-169 (19).

the question in the affirmative in *State v. Holliday*, 109 R.I. 93, 103, (1971):

> We hold, then that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy and prompt trial by an impartial jury in the first instance.

The Supreme Court of Virginia reached the opposite conclusion in *Manns v. Commonwealth*, 213 Va. 2nd 233 (1972)[27] holding that Mr. Justice White's footnote 30 in *Duncan* "makes it clear" that the question of "incorporation" was an "open" one. See also to the same effect, *Walker v. Dillard*, 363 F. Supp. 921 (W.D.V. - 1973) which, like *Manns*, relied on Mr. Justice Fortas' concurring opinion to *Duncan*. Since these opinions are contrary to this Court's holding in *Duncan*, appellant alleges that they are inapposite.

In *Whitmarsh v. Commonwealth*,___Mass.__, 316 N.E. 2d 610, 618-619, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment *would be* interpreted at the present time by the Supreme Court to require a trial by jury in the first instance . . . , or (b) that *even if* that court did reaffirm this rule . . . with respect to the Federal Courts, it *would* apply such a requirement in equal fashion to the states." Appellant submits that it was the duty of the Supreme Judicial Court under Article VI of the Constitution to interpret the decisions of this Court as they existed and apply them. Instead, the Supreme

[27]Cf. *Manns v. Koontz*, 451 F.2d 1345, (4th Cir. 1971)

Judicial Court evaded the issue on the grounds that "the meaning of the Sixth Amendment's jury trial provision and perhaps also specific instances of its application to the States . . . continues to be in flux." In any event, the decision should be accorded no value.

Lastly, on this branch of the argument, applicant maintains that *Williams v. Florida*, 399 U.S. 78 (1970) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) are not contrary to his position that *Duncan* bound the States to the rule of *Callan v. Wilson*. In *Williams*, this Court held that the States are not required to afford a defendant a twelve-man jury as the meaning of the Sixth Amendment did not include a twelve-man jury requirement. In reaching this conclusion, the Court in effect overruled the federal twelve-man requirement and hence this decision is entirely consistent with Mr. Justice White's remark in n. 30 in *Duncan*:–"[o]ur decisions interpreting the Sixth Amendment are always subject to reconsideration. . . ." Quite apart from this consideration, *Duncan* was expressly reaffirmed by the Court at p. 86, and by Mr. Justice Black concurring at p. 107:

> We have emphatically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11. Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to reexamine prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12

members could satisfy the Sixth Amendment requirement arose in situation where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the question presented here arisen in a federal court before our decision in *Duncan v. Louisiana*, 391 U.S. 145, (1968), this Court would still, in my view, have reached the result announced today.

In *Apodaca v. Oregon*, 406 U.S. 404, this Court held that the unanimous jury requirement of the Sixth Amendment was not applicable to the States. In so holding, four justices impliedly overruled the requirement as to federal trials and as such their plurality opinion is consistent with *Duncan*. Mr. Justice Powell reached the same conclusion, but was not in "accord with a major premise upon which that judgment" was based, namely "that the concept of jury trial as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment," *Apodaca, supra*, 369. Three justices in dissent felt that the federal standard should not be changed and hence, the states should be bound to the unanimous jury requirement on the basis of *Duncan*. Accordingly, appellant submits that this decision is not a departure from *Duncan* in principle. It simply redefined "what is meant by the concept 'jury' " in the context of the Sixth Amendment.

IV

THE INTERPOSITION OF A TRIAL BY MAGISTRATE PRIOR TO AFFORDING A DEFENDANT A JURY TRIAL IS AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO TRIAL BY JURY.

As Justice Harlan calls to our attention in *Baldwin v. New York*, 399 U.S. 66, 137, the bedrock of *Callan v. Wilson* is that the accused should not be put to "the burden of two trials if he wishes a jury verdict." That "burden" was eloquently set out by Mr. Justice Thomas of the Supreme Judicial Court in his memorable dissent in *Jones v. Robbins*, 8 Gray 329, 351-2:

> It seems to me plain that, when the Constitution declares that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury," its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed clog and obstruct his trial by jury; but the difference between that and this is in degree only.
>
> The subjecting the accused to one trial by a single magistrate obstructs the right of a trial by jury,

and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. It interposes unnecessary delay between the accusation and trial by his peers. It subjects him to unnecessary and often fatally burdensome expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay".

When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and that he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common law rights secured by it, shrinks from the conclusion; yet it is to be observed, that the twelfth article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground.

I am aware that in some text-writers of authority, and in the dicta of judges for whom I feel the highest respect it has been said, that if there is an unobstructed and unclogged right of appeal to a court in which a trial by jury can be obtained, the article of the Bill of Rights is satisfied. To this view I answer . . . [t]hat is not an unobstructed and unclogged right of appeal, which the twelfth article secures, but an unobstructed and unclogged right of trial by jury.[28]

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[28]"To these weighty words of Judge Thomas no satisfactory reply has ever been made."–*State v. Gerry*, 68 N.H. 495, 507 (1896).

Initially, it is observed that Justice Thomas recognized the possibility that if a "citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time". This same objection was raised by Justice Blatchford in *In re Dana*, 7 Benedict 14: (1876) "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial, . . . it is difficult to see why it may not also have the power to provide several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury". Cf. *Williams v. Florida*, 399 U.S. 78, 91 n.28.

The "unnecessary and often fatally burdensome expense" referred to by Justice Thomas comprises the defendant's legal fees, witness fees, bail bond premium, and his loss of time and pay. For the accused who is innocent, but found guilty, he must bear these expenses for a meaningless proceeding before he ever gets into court where he may obtain a verdict by a jury. While it is true that Massachusetts assigns indigents free counsel,[29] *Argersinger v. Hamlin*, 407 U.S. 25 (1972), there are many defendants who are just above the indigent level and must hire private counsel for their defense in the lower Massachusetts courts. On the average, this expense is between $150-250. If the defendant "appeals" for a trial de novo he must pay further counsel fees of a minimum of $400. Cf. Massachusetts Bar Associations' Minimum Fee Schedule (1973). The expense of the lower court trial is often

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[29]Rule 3:10 of *Rules of the Supreme Judicial Court;* G.L. Ch. 221 Sec. 34D.

"fatally burdensome". For example, recently, this attorney witnessed a trial in a district court in which a school teacher was convicted for larceny of merchandise from a discount store. Upon conviction the defendant's lawyer informed him of his right to a jury trial. The defendant asserted his innocence and indicated he wanted to "appeal". His counsel then informed him that the cost for his services on "appeal" for arraignment and trial would be $450. The defendant replied "Well I already have lost two days pay and $250 and if we appeal it will cost me another two days pay and $450 more. I cannot afford that. We better take the best deal we can get here."[30]

In and above the financial burden, appellant maintains that the district court trial has a limiting effect on the right to trial by jury. Some of the more discouraging aspects of the proceeding are recorded by Bing and Rosenfeld in *The Quality of Justice* at p. 105-106:

> Arguments on motions when they are brought, pit the judge and defense counsel as adversaries. The police prosecutor, unfamiliar with controlling court decisions, participates only to comment upon the facts. The burden falls upon the judge first to develop the arguments in opposition to the defense motion, and then decide who has made the better argument.
>
> When defense counsel make motions to suppress illegally obtained evidence, district court judges

[30]"We have concluded on the basis of hard statistical data that in determining guilt or innocence, a man's finances are more important than the circumstances surrounding the charge, and ultimately, money determines the final disposition," Bing and Rosenfeld, *The Quality of Justice,* p. ix. See also Hasler, *De Novo Jury Trials,* 23 Maine Law Rev. 63, p. 82-83, (1971).

> frequently reserve decision until the entire case has been heard. If he thinks the defendant is guilty–influenced in part by the questionable evidence–rather than weighing the motion exclusively on its merits, he is in a position to balance the legal merits of the motion against the seriousness of the crime.
>
> The trials themselves are brief. One judge's impatience with zealous defenses was expressed when he remarked to a defense counsel, "We don't follow those Supreme Court decisions here."
>
> The formal requirement for a guilty finding is proof beyond a reasonable doubt. In district court trials, there are strong indications that the government's burden is reduced to showing that the preponderance of the evidence establishes the defendant's guilt. . . .
>
> At the heart of the district court's attitude, which overlooks rules of law and guaranteed rights, is the belief that the defendant can always protect himself by asserting his right to trial de novo.[31]

No doubt can exist that the net effect of such a trial is to discourage the accused, if he is found guilty, from proceeding further.

Quite apart from the trial itself, the sentencing procedure is often a fatal deterrent on the exercise of the accused's right to trial by jury. For example, in the instant case, after finding Steven Costarelli guilty, the

[31]The most graphic illustration that the burden of proof is reduced to the preponderance of the evidence test is a case reported by Bing and Rosenfeld, *The Quality of Justice,* at p. 83. In this decision, the trial judge resolved the conflicting testimony of the defendant and police officers by holding: "Well I don't know who to believe. Just to play safe I will find you guilty."

trial judge in the Municipal Court announced that he would impose a one year suspended jail sentence if the defendant would forgo his "right of appeal" for a trial by jury, or otherwise he would impose a one year sentence. When this attorney objected to the choice the trial judge addressed Steven Costarelli: "Take your pick, one year suspended with no appeal, or one year with appeal".[32] Steven Costarelli exercised his right in accordance with this counsel's strong advice and over his own judgment. The trial judge then imposed the one year sentence (App.-5).[33] This type of sentence conditioning is not the result of personal vindictiveness,[34] Cf. *Blackledge v. Perry*, 417 U.S. 21, (1974), but rather it is the product of the institutional interest of the district court judge in discouraging what he considers frivolous "appeals". For another paradigm see *Grayson v. Montgomery*, 421 F.2d 1306 (1st Cir. 1970).

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[32]See *Quality of Justice* at p. 86-88 for more "detailed" description of this procedure.

[33]Regarding this alleged impropriety, Steven Costarelli has petitioned the Supreme Judicial Court for extraordinary relief, *Costarelli v. DeGuglielmo*, No. 034.

[34]Bing & Rosenfeld, *The Quality of Justice*, at p. 86-88; *Chaffin v. Stynchone* 412 U.S. 17 (1973).

In addition to the deterrent sentencing procedures in the district court, the defendant faces the threat of a harsher sentence being imposed if he is reconvicted in the superior court. More specifically in *Mann v. Commonwealth*, ____ Mass. ____,271 N.E. 2nd 331, the Supreme Judicial Court held that a superior court judge may augment the district court sentence and that he does not have to affirmatively justify such action. See also *Lemieux v. Robbins*, 414 F.2d 353 (1st Cir. 1969), cert. denied, 397 U.S. 1017, (1970) holding the same. The decisions in both these cases rested upon *North Carolina v. Pearce*, 395 U.S. 711 (1969). However, the issue in *Pearce* was whether the threat of an increased penalty being imposed on retrial burdened the "right to appeal" in contradistinction to the right to trial by jury. These rights are entirely different. In the first case, the second trial results "at the defendant's behest". In the second case, the second trial results from the government's "behest" as it cannot imprison the accused unless it is pursuant to the judgment of his peers, and under these circumstances, the imposition of an increased penalty constitutes a penalty on the right to trial by jury:

> I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated, by the accused having

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[36]G.L. Ch. 218 Sec. 26 (Br. App.-54).

> claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right?
>
> *Greene v. Briggs*, 10 F. Cas. 1135, 1141, (No. 5,764) (C.C.R.I. 1852).

This distinction was raised in *Whitmarsh v. Commonwealth*, Mass., 316 N.E. 2nd 610, 619-620, but the Supreme Judicial Court rejected it on the authority of *Colten v. Kentucky*, 407 U.S. 104 (1972). In *Colten*, this Court sustained an augmented sentence imposed after a trial de novo in the second tier of Kentucky's two-tier procedure. But this holding is not controlling because the two-tier procedure in Kentucky is fundamentally different than the Massachusetts procedure. In the Kentucky procedure, the accused is afforded a jury trial in the first tier. Colten expressly waived this right.[35] Accordingly, his trial de novo in the second tier of the Kentucky procedure was at his "behest" and as such was equivalent to retrial subsequent to "appeal" as was the case in *Pearce*.

Quite apart from this consideration, this Court took pains to note that in the Kentucky procedure, "the record from the lower court is not before the superior court and is irrelevant to its proceedings", and "[i]n all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can

[35] "Although appellant here was entitled to a six-man jury, . . . which he waived . . ." *Colten*, at p. 113. Additionally, it should be observed that Colten was not even entitled to a jury trial at any time as the maximum penalty under the statute upon which he was charged did not exceed six months imprisonment.

hardly be said to have 'enhanced' the sentence." As such, this Court refused to impose the prophylactic rule of *Pearce*. In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court, G.L. Ch. 278 Sec. 20 (Br. App 4a).[36] As a matter of practice, the resentencing judge usually inquires initially as to why the district court sentence should not be reimposed. Such a procedure manifests the institutional weight of judicial comity between the two tiers in the Massachusetts system.

Additionally, in *Colten*, this Court observed at p. 119-120, that the defendant in the Kentucky procedure "can circumnavigate the inferior court simply by pleading guilty and erasing immediately thereafter any consequence which would otherwise follow from tendering the plea."[37] There is no similar procedure in Massachusetts. If the accused pleads guilty, his plea is considered a waiver of his right to a jury trial, *Commonwealth v. Crapo*, 212 Mass. 209-210. The defendant must stand trial in a proceeding that denies him his Sixth Amendment right. Accordingly, it is submitted that *Colten* does not control.

Appellant submits that the above noted burdens, namely the additional legal fees, witness fees, bail

[36] The de novo jury is also aware that the accused has been previously adjudged guilty. Compare *Chaffin v. Stynchcombe*, 412 U.S. 17, 28, n.13-14.

[37] Cf. *Lemieux v. Robbins*, 414 F. 2nd 353, 356 (1st Cir. 1969), cert. denied 397 U.S. 1017: "[W]e hold the defendant has no constitutional right to complain of a "chilling effect" when in effect, he need not stand in the draft in the first instance."

premium, loss of pay, and the threat of increased penalties in the superior court are a deterrent on the exercise of the accused's right to trial by jury. In a given case, any one of the above factors may tip the scales against the accused in exercising his right to trial by jury. Additionally, and perhaps most important, there is the deterrent effect of the trial, conviction, and sentence. When viewed in toto, the conclusion is inescapable that the interposition of a trial by magistrate deters the exercise of the right to trial by jury, and as such, constitutes an unconstitutional burden on the right, *United States v. Jackson*, 390 U.S. 570, 582, 583 (1967): "A procedure need not be inherently coercive in order that it be held to impose an impermissable burden;" for "if the provision had no other . . . effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional."[38]

Two arguments have been set forth to establish that the imposition of a trial by magistrate is not an unconstitutional burden on the right to trial by jury. The first is set forth by Mr. Justice Shaw in *Jones v. Robbins*, 8 Gray 329, 341 namely, that the only burden placed on the accused in the two-tier process is the delay and recognizance which "are the same and no greater than they would be in case the magistrate, instead of passing sentence should, on examination, bind the accused over, or, as the necessary alternative,

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[38] See also *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969), Stewart concurring.

commit him to jail". This theory is fully rebutted by Chief Justice Carpenter in *State v. Gerry*, 68 N.H. 495, 505-6 (1896):

> To say that the required recognizance upon an appeal subjects the party to no greater inconvenience,—is no greater burden than the recognizance required upon an examination and binding over,—if it were true, does not conclude the matter. It is not merely the recognizance but the judgment of the magistrate, the sentence without a jury trial, that burdens. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case, the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the Massachusetts statute, sentenced by the court appealed to as if he had been convicted in that court. By his default he is held to waive a jury trial. *Commonwealth v. Whitney*, 108 Mass. 5, 6, 7.

The Massachusetts statute referred to above was the predecessor to G.L. Ch. 278 Sec. 24, (Br. App. 1a), which requires that upon the failure of the defendant to prosecute his "appeal", "he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted in." This statute in effect shifts the burden to the accused, a patently unconstitutional procedure:

> A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to

appear and demand the trial, without which the constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had, is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime, . . . As long as he remains entirely passive,–as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty,–he is assured by the express terms of the constitution that he cannot be punished until the state has obtained a verdict of guilty from twelve of his neighbors. "No subject shall be deprived of life, liberty, or estate but by the judgment of his peers." This language does not mean–it cannot reasonably be construed to mean–that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to procure a constitutional trial. *State v. Gerry,* supra, p. 506.

The second contention is that trial de novo is to the defendant's advantage in that he "gives up nothing by going to trial in the district court," *Lemieux v. Robbins,* supra, at p. 355, while at the same time "he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own", *Mann v. Commonwealth,*___Mass.___271 N.E.2d 331, 334.[39] When viewed in light of some of the collateral consequences that attach to the accused upon conviction in the district court, e.g. loss of one's driver's license, this argument flies in the face of reality. Quite

[39] "Thus, in effect, . . . the defendant has 'two bites at the cherry'," *Mann v. Commonwealth,*__Mass._, 271 N.E.2d 331, 332.

apart from this, the defendant cannot help but expose his defense through cross examination of the government's witness.[40] Likewise, cross examination has the tendency of hardening and polishing the government's witnesses in the de novo trial in the superior court. See e.g. *Ashe v. Swenson*, 397 U.S. 436, 439-440 (1970); and *Carsey v. United States*, 392 F.2d 810, 813-814 (D.C. cir. 1967) which detail the metamorphasis of testimony in the first and subsequent trials. Alternatively, if defense counsel does not cross examine the government's witnesses in the district court, and if they subsequently become unavailable, their unimpeached testimony will be admitted against the accused since the opportunity to cross examine the witnesses existed in the district court. *Commonwealth v. Mustone,* 353 Mass. 490 1968) distinguishing *Pointer v. Texas,* 380 U.S. 400 (1965).

Lastly, on this section of the argument, it should be observed that in addition to being a burden on the right, the imposition of a trial by magistrate manifestly runs counter to the "purpose" and "function" of the right to trial by jury:

> As we said in *Duncan*, the purpose of trial by jury is to prevent oppressions by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of

[40] Cf. *Myers v. Commonwealth,* ____ Mass. ____, 298 N.E.2d 819, 828 (1973).

laymen. . . ." *Williams v. Florida*, supra, at 100. *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972).[41]

Accordingly, appellant submits that the rule of *Callan v. Wilson* is not just a "detail" in the definition of what is meant by a jury, but rather it is an essential element of the right, and for this reason, it should be left undisturbed.

V.

THERE IS NO COMPELLING INTEREST ON THE PART OF MASSACHUSETTS TO JUSTIFY ITS INFRINGEMENT OF THE RIGHT TO TRIAL BY JURY.

When Steven Costarelli was placed in jeopardy before the Municipal Court of Boston, it was his right to obtain a jury verdict, *Duncan v. Louisiana*, 391 U.S. 145. Massachusetts had no more right to deny him this *fundamental right* than the right to confront witnesses against him, or the right to counsel of his own

[41] De novo jury trials for serious offenses were not existent at common law or in America in 1784. De novo bench trials were in existence in England for petty offenses, Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury*, 39 Harv. L. Rev. 917, 932-36 & n.85 (1926). In New Hampshire a de novo jury was afforded the accused in case of misdemeanors. "In all other cases trial by jury was free. The accused was not obliged to purchase, or even to demand, it. . . . The burden rested not upon him to procure either a trial or an acquittal. It rested on the state—to obtain a trial by jury, as well as a conviction by their verdict." *State v. Gerry*, 68 N.H. 495, 499-500 (1896).

choosing, or the right to remain silent. The abridgment of this right by the trial judge of the Municipal Court was a denial of the right, and it is no answer on the part of Massachusetts to say that it offered the defendant a trial de novo with the full panolpy of Sixth Amendment procedural rights. This argument was rejected in *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, wherein the accused was initially denied an impartial tribunal:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; . . . Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

But even if it assumed, arguendo, that the interposition of a trial by magistrate is an incidental burden on the right to trial by jury, appellant maintains that there is no "compelling state interest" to justify the infringement on the *fundamental right* to trial by jury, *Roe v. Wade*, 410 U.S. 113, 155; *Shapiro v. Thompson*, 394 U.S. 618, 631-634 (1969); *Sherbert v. Verner*, 374 U.S. 398 403-406 (1963). Massachusetts, of course, has an interest in allocating its judicial resources by maintaining a two-tier structure.[42] but this interest can

[42] *Lemieux v. Robbins*, 414 F.2d 353, 355 (1st cir. 1969), cert. denied, 397 U.S. 1017; Hasler, *De Novo Jury Trials*, 23 Maine Law Rev. 63 (1971). But see Mr. Justice Black's retort in *Green v. U.S.*, 356 U.S. 165, 216 (1958): "It is undoubtedly true that a judge can dispose of charges . . . faster and cheaper than a jury.

be achieved equally as well, if not more efficiently, by allowing the accused the option of proceeding initially in the first tier or obtaining a jury trial in the first instance in the second tier. See *Holliday v. State*, 109 R.I. 93 (1971); and *Baldwin v. New York*, 399 U.S. 66, 74, n.22 (1969). Indeed the allowing of the accused this option would more than likely effect a saving of Massachusetts judicial resources.[43]

But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

[43]There are certain types of cases in which a defendant, if given an option, will always choose a trial by jury in the first instance, or if not given the option, will always "appeal" for a trial de novo. This is particularly true in driving under the influence of intoxicating liquors cases where conviction results in the loss of one's driver's license for a minimum of one year and where the reversal rate of district court convictions by juries is extremely high. See Boston Herald American, Feb. 24, 1973, which reported that in one session of Suffolk Superior Court "19 out of 22 defendants who appealed lower court findings of guilty imposed by judges were subsequently acquitted by juries of their peers!"

VI.

THE FORCED INTERPOSITION OF A TRIAL BY MAGISTRATE PRIOR TO AFFORDING THE ACCUSED A TRIAL BY JURY IS AN UNCONSTITUTIONAL IMPOSITION ON THE RIGHT TO A SPEEDY TRIAL.

Referring again to Justice Thomas' dissent in *Jones v. Robbins*, supra, it is observed that he objected to the "unnecessary delay between accusation and trial by . . . [the defendant's] peers", on the grounds that a defendant ought to obtain his right to a trial by jury " 'freely, and without delay' ". The latter words come from Article XI of the Massachusetts Constitution which reads:

> Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely and without being obliged to purchase it; completely and without denial, promptly and without delay; comformably to the law.

Article XI is in essence the underpinning to the speedy trial guarantee of the Sixth Amendment which this Court made applicable to the states in *Klopfer v. North Carolina*, 386 U.S. 213, 222-3, 225-6 n.21 (1966):

> We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.

Initially, appellant maintains that it is unnecessary to decide whether the total time elapsed between arrest,

trial in the district court, and trial de novo in the superior court is impermissable per se in light of the Sixth Amendment standards, Cf. *United States* ex rel. *Frizer v. McMann*, 437 F.2d 1312, (2nd cir. 1971); *United States v. Butler*, 426 F.2d 1275 (1st cir. 1970). However, some passing observations are helpful. First, the time schedule in the superior court for trial of misdemeanors and less serious felonies is deplorable. Chief Justice Tauro of the ~~Superior~~ Supreme Judicial Court summarized the judicial log-jam succinctly in his 1972 State of the Judiciary address, 57 M.L.Q. 209, 2, 3: "The dismal plight of the superior court cannot in any sense support even guarded optimism." See also *Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts*, 488 F.2d 1271, (1st cir. 1973) cert. denied ____ U.S. ____ (1974). When one considers the added delay of a trial in the district court, the intervening time between "appeal" and docketing in the superior court, it is observed that the total time between arrest and trial by jury may be between six months and a year and a half.[44] No doubt exists that this time period, in itself, would violate the speedy trial provisions applied in many jurisdictions. See e.g. Rule 4 of the Second Circuit Court of Appeals: "In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried."; and ABA, *Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial* (1968).

[44] In Suffolk County, the misdemeanor session sits continuously in the superior court and the time delay in "appeal" is short.

Although Massachusetts' court congestion is entitled to some weight in excusing delay, this Court has stated in *Barker v. Wingo*, 407 U.S. 514 (1972) that "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant". In a concurring opinion Justice White emphasized this point more strongly at p. 537-538:

> A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and, only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial. "[T]he evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."

In light of this criteria, it is submitted that the "unnecessary delay" noted by Justice Thomas is not a factor entitled to some weight in justifying Massachusetts' delay in bringing a defendant to trial. Indeed, in light of the expense and burden a defendant must suffer by a district court trial, the "unnecessary delay" is more akin to a "deliberate attempt to delay the trial in order to hamper the defense" and "should be weighed heavily against the government", *Barker v. Wingo*, supra, p. 531. Implicit in the right to a speedy trial is the right to a speedy trial by jury, and the interposition of a trial without a jury is an unnecessary burden on the right.

Quite apart from these considerations, the more serious charge against the trial de novo system is that it is totally counterproductive in minimizing the "anxiety and concern of the accused", *Barker v. Wingo*, supra, p. 532 one of the main purposes of the speedy trial guarantee. This object is set out more fully by this Court in *United States v. Marion*, 404 U.S. 307, 321 (1971):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina*, supra.

The same reasoning is also applicable to the defendant who is not arrested: "Finally even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility", *Barker v. Wingo*, supra, p. 533.

For the defendant who simply listens to the government's case, and wishes not to disclose his defence, a trial in the district court is a meaningless proceeding which may "drain his financial resources". The finding of guilty and "appeal" do not minimize anxiety but amplify it; and the ordinary inference drawn from "appealing" generates a "cloud of suspicion". In short, the two-tier de novo procedure cuts away the right to a speedy trial at its roots. See *State v. Holliday*, 109 R.I. 93, 103:–"The Constitutional right to a speedy trial by a jury contemplates that the accused

shall be entitled to a trial by a jury at the time he is initially subjected to judicial process which could subject him to a loss of liberty by imprisonment in excess of a period of six months."

VII.

MASSACHUSETTS' TWO-TIER TRIAL DE NOVO PROCEDURE VIOLATES THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AMENDMENT.

In *Benton v. Maryland*, 395 U.S. 784, 794, (1969), this Court bound the states to the double jeopardy provisions of the Fifth Amendment by incorporating them in the Fourteenth Amendment. The underpinnings of these provisions are set out by Justice Harlan in *United States v. Jorn*, 400 U.S. 470, 479 (1971):

> A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both those considerations are expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an

> individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Appellant alleges that Massachusetts' trial de novo procedure, if tested in the light of these criteria, cannot sustain constitutional validity.

The two-tier procedure inherently subjects a defendant twice to the heavy "personal strain which a criminal trial represents". A conviction in the district court subjects him in the eyes of the community to the "embarrassment" of being "found guilty" and "appealing" in a criminal proceeding. Similarly, conviction in the district court "burdens the defendant with a meaningless expense and ordeal and compells him "to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty". In short, such a procedure is not consonant with limiting "the Government to a single criminal proceeding to vindicate its vital interest in enforcement of criminal laws". Implicit in limiting the government to one crack at the defendant is limiting it to a proceeding which comports with Sixth Amendment standards.

Similarly, appellant maintains that the prohibitions of double jeopardy clause not only bar punishing a defendant twice for the same crime, but bar placing him to his defense a second time, *Ex Parte Lange* 18 Wall 163, 169 (1893). While it is true that retrial is not barred by double jeopardy principles in the case of the defendant who perfects a successful appeal, *United States v. Ball,* 163 U.S. 662 (1896), it is equally true

that the bar to reprosecution is not "confined to prevention of prosecutorial or judicial overreaching" *United States v. Jorn,* supra, 484, but extends to designed governmental procedures that place a defendant to his defense a second time to obtain that which he is entitled to in the first instance.

More specifically, the double jeopardy clause bars reprosecution when absent a "manifest necessity", the accused is deprived of "his valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *United States v. Jorn*, supra, 484. In *Jorn*, this Court held reprosecution was barred after a mistrial was declared by the trial judge, sua sponte, since the defendant was denied his option to go to the jury once he was placed in jeopardy. Similarly, in the instant case, once Steven Costarelli was placed in jeopardy, he was entitled to the judgment of his peers and the denial of his motion for a jury trial was equivalent to the trial judge's declaration of a mistrial in *Jorn*. In both cases, the defendant was deprived on his jury verdict once he was put to trial.

CONCLUSION

Appellant submits (1) that his conviction in the Municipal Court of Boston was unconstitutional since he was denied his Sixth Amendment right to a trial by jury; (2) that reprosecution is barred since his Sixth Amendment right to a speedy trial was abridged; and (3) that reprosecution is barred by the double jeopardy provisions of the Fifth Amendment.

WHEREFORE, appellant prays that this Court reverse his conviction and remand this case to the Municipal Court of the City of Boston with instructions that the complaint upon which he was charged should be dismissed with prejudice.

Respectfully submitted,

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. Ch. 263 Sec. 4

> No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

G.L. Ch. 278 Sec. 24

> If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

G.L. Ch. 263 Sec. 6

A person indicted for a crime shall not be convicted thereof except by confessing his guilt in open court, by admitting the truth of the charge against him by his plea or demurrer or by the verdict of a jury accepted and recorded by the court or, in any criminal case other than a capital case, by judgment of the court rendered as hereinafter provided. Any defendant in the superior court in a criminal case other than a capital case, whether begun by indictment or upon complaint or any defendant in the housing court of the city of Boston or in the housing court of the county of Hampden in a criminal case, may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court, whereupon he shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are two or more charged with offenses growing out of the same single chain of circumstances or events whether prosecuted under the same or different indictments or complaints shall have exercised such election before a jury has been impanelled to try any of the defendants; and in every such case the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon.

Amended by St. 1971, c. 843, §21; St. 1973, c. 591, §20.

G.L. CH. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Amended by St.1958, c. 138; St.1962, c. 722, §8; St.1964, c. 140; St.1969, c. 496; St.1973, c. 585.

G.L. CH. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six,

until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A. Amended by St.1973, c. 657.

G.L. CH. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

G.L. Ch. 90 Sec. 24 (2) reads in part:

(a) . . . . and whoever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars

nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a subsequent offense by imprisonment in the state prison for not more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment: . . . .

(b) A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under the preceding paragraph of this section, in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution of such person in the superior court has terminated in favor of the defendant, or, after an investigation or upon hearing, may issue a new license or reinstate the right to operate to a person convicted in any court of the violation of any provision of paragraph (a) of subdivision (2) of this section; provided, that no new license or right to operate shall be issued by the registrar to . . . any person

convicted of violating any other provision of paragraph (a) of subdivision (2) of this section until sixty days after the date of his original conviction if for a first offense, or one year after the date of any subsequent conviction within a period of three years.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

BRIEF FOR THE APPELLEE

FRANCIS X. BELLOTTI
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Bureau
DAVID A. MILLS
Assistant Attorney General
Chief, Criminal Appellate Section
131 Tremont Street
Boston, Massachusetts 02111
Attorneys for the Appellee

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In the
Supreme Court of the United States

October Term, 1974

No. 73-6739

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

BRIEF FOR THE APPELLEE

I. Opinion Below

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

II. Statement With Respect to Jurisdiction

The jurisdiction of this Court has been invoked pursuant to 28 US.C. §1257(2). The appellant was convicted and sentenced in the Boston Municipal Court on February 27, 1974. (App. 7a).[1] A notice of appeal to the United States Supreme Court was filed in the lower court on May 16, 1974. (App. 8a). The appellant's jurisdictional statement was filed in this Court on May 20, 1974, and this Court granted the motion for leave to proceed in *forma pauperis* and postponed jurisdiction on October 21, 1974.

To the jurisdictional statement the Commonwealth of Massachusetts filed a motion to dismiss pursuant to Rule 16(1)(a) of the Rules of this Court, and, in this portion of the Brief for the Appellee, in accordance with Rule 16(6), the appellee addresses the question of jurisdiction, suggesting by way of introduction, that this Court does not have jurisdiction of the appeal pursuant to 28 U.S.C. §1257(2).[2]

The jurisdiction of this Court to review decisions of state courts derives from §1257 which provides in pertinent part that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

[1] "App. ___" references are to the separate appendix filed pursuant to Rules 26 and 36. The appendices in this Brief will be cited as "Appendix A," etc.

[2] The appellee recognizes that this Court may treat the case as one on petition for writ of certiorari in the event that it is determined that the appeal was improvidently taken. 28 U.S.C. §2103. See *Anonymous* v. *Baker*, 360 U.S. 287, 290 (1959). Notwithstanding, the appellee suggests that the arguments contained in this Brief with respect to "finality" and "highest court of a State" prerequisites to jurisdiction are and would be substantially appropriate in opposition to a grant of certiorari.

> (1) • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States. 28 U.S.C. §1257.[3]

In this particular case it appears that the "judgment or decree" which is the basis of appeal is a conviction and sentencing (or judgment of "guilty") in the Municipal Court of the City of Boston.[4] The appellee suggests that this "judgment" is an inadequate basis for jurisdiction under §1257 because: (1) it is not a "final" judgment; and, (2) it is not a judgment rendered by the highest court of Massachusetts in which a decision could be had.[5]

[3] See note 2, *supra*.

[4] In Massachusetts practice it appears that the "judgment" in a criminal case is the sentence. *Commonwealth* v. *Locke*, 338 Mass. 682, 684 (1959), citing, *inter alia*, *Birnbaum* v. *United States*, 107 F.2d 885, 886-87 (4th Cir. 1939). This definition appears to be consistent with this Court's pronouncement in *United States* v. *Hark*, 320 U.S. 531 (1944).

[5] The appellee further suggests that the judgment in this case is inadequate to be the basis of *appeal* under sub-section (2) of §1257 because the judgment does not draw in question the validity of a "*statute* of any state." Appellee suggests that the appeal may be argued as drawing into question a right, privilege or immunity; however, the Massachusetts procedure for providing a jury trial to an accused is not explicitly defined or prescribed by a particular statute. Indeed, the appellant has not specified a Massachusetts statute as being in question. Rather, the appellant alleges that seven

Appellee further notes that upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to affirmatively establish jurisdiction. *Gorman* v. *Washington University,* 316 U.S. 98 (1942).

A. *The "Judgment" Lacks Prerequisite Finality.*

This Court has stated that "no self-enforcing formula defining when a judgment is 'final' can be devised." *Republican Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67 (1948). And, indeed, as early as 1869 the Court implicitly rejected a simple mechanical formula with respect to finality, speaking rather of "the *degree* of finality essential to the right of appeal. . . ." *Thompson* v. *Dean,* 74 U.S. 342, 345-46. (Emphasis added.)[6] However, despite the absence of

Massachusetts statutes and one constitutional provision "comprise the framework of Massachusetts' two-tier trial de novo criminal procedure. . . ." Brief for the Appellant, p. 9.

There is no Massachusetts statute which prohibits a jury in the Boston Municipal Court or, alternatively, directs that criminal defendants of particular categories be tried without jury in the first instance. Rather, the procedure is, it is argued, a practice which develops because of the definition of jurisdiction of the district and municipal courts in Massachusetts which happen to be without jury, in the first instance. The Massachusetts procedure appears to be more in the nature of custom and usage (see 42 U.S.C. §1983) and, as such, were the briefs and papers in this case to be treated as a petition for writ of certiorari, the appellee would suggest that the petition be denied because, among other reasons, the nature of the right or immunity claimed by the appellant would be more fully and appropriately developed in a proceeding based upon 42 U.S.C. §1983 in a federal court.

[6] No distinction is being made by the appellee in this brief with respect to the different jurisdictional statutes which have been considered by this Court in the cited decisions in view of the following statement by this Court:

> The provision of §1257 that only "Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." has always been carried in almost identical language since the judiciary act of 1789, 1 Stat. 85, §25.

Building Union v. *Leadbetter Co.*, 344 U.S. 178 (1952), modified, *Construction Laborers* v. *Curry*, 371 U.S. 542, 552 (1963).

absolutes, there appear to be certain principles germane to this Court's determination of whether a state judgment is final for purposes of review under §1257:

(1) The question of "finality" is one of purely federal law. *Gotthilf* v. *Sills,* 375 U.S. 79 (1963);

(2) The designation given to the "judgment" by state procedure is not controlling upon this Court. *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947); *Department of Banking* v. *Pink,* 317 U.S. 264 (1942);

(3) The judgment must leave nothing more to be decided. *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69 (1946); *Clark* v. *Williard,* 292 U.S. 112 (1934);

(4) The judgment must be an effective determination of the litigation and subject to no further review or correction in any other state tribunal. *Richfield Oil Corp., supra; Market Street Railway Co.* v. *Railroad Commissioner of California,* 324 U.S. 548 (1945);

(5) The issue of finality will be resolved not only by examination of the entire record but, when necessary by resort to local law to determine *what effect* the judgment has under the state rules of practice. *Gospel Army, supra; Richfield Oil Corp., supra;*

(6) This Court uniformly insists that further available appellate review be pursued within the state court system. *Banks* v. *California,* 395 U.S. 708 (1969); and,

(7) History bears ample testimony that the Congressionally-imposed limitations upon this Court's power of review is an important factor in securing harmonious state-federal relations. *Republican Natural Gas Co.* v. *Oklahoma, supra.*

Upon examination of the judgment in this case, the appellee suggests that it fails to satisfy the jurisdictional requirement of finality in that: (a) the judgment is not an "effective determination of the litigation"; it cannot be said that the judgment "leaves nothing more to be decided" and, (b) there are further possible avenues of appellate review with respect to the judgment which have not been pursued.

1. *The Judgment Of The Boston Municipal Court Is Not An Effective Determination Of The Litigation.*

In Massachusetts there are four "levels" of criminal procedure, or, more precisely, four courts which have cognizance of criminal matters: the District Courts (Mass. Gen. Laws ch. 218, §26),[7] the Superior Court (Mass. Gen. Laws ch. 212, §6), the Massachusetts Appeals Court (Mass. Gen. Laws ch. 211A), and the Supreme Judicial Court Mass. Gen. Laws ch. 211, §5).[8] A Massachusetts defendant who is convicted of a crime before a district court has several options.[9] He may, of course, accept his sentence or disposition as final and do nothing; he may appeal the finding of guilty to the Superior Court, with or without jury.

[7] There is considerable justification for treating the Massachusetts District Courts and the Boston Municipal Court as different systems. The Municipal Court of the City of Boston was established by statute in 1821, and the Massachusetts District Courts were established by statute in 1893. See, e.g., Seventeenth Annual Report to the Justices of the Supreme Judicial Court, p. 4 (1973). However, for purposes of this immediate discussion, it is suggested that they may be considered as equivalent courts. See Brief for the Appellant, p. 2; Appendix A, n. 1.

[8] An explanation of the jurisdictional bases for each of these Massachusetts courts is included as Appendix A to this brief, *infra.*

[9] It should be noted that the Commonwealth has no right of appeal in any criminal matter in any court of the Commonwealth except for a limited right to appeal in felony cases from decisions by the Superior Court with respect to specific pre-trial matters. See Mass. Gen. Laws ch. 278, §28E.

Mass. Gen. Laws ch. 278, §18. Additionally, defendants convicted of less serious crimes (including Mass. Gen. Laws ch. 90, §24, the lower court conviction in the instant case), depending upon the court of conviction, have available several options for jury trial within the district court system.[10]

Appellee's research discloses that the appeal by a criminal defendant in Massachusetts who had first been convicted in a municipal court without jury, was first designated *de novo* in the case of *Sullivan* v. *Adams,* 69 Mass. 476 (1855):

> [W]e think that when an appeal is granted, it means that there shall be a full trial in the court appealed to, *de novo,* and thus the object of giving the appeal will be accomplished. 69 Mass. at 478.

It was further explained that such an appeal "opens to [the appellant] . . . the whole case, as to the law, the facts and the judgment." *Commonwealth* v. *O'Neil,* 72 Mass. 343 (1856).[11]

More recently the Massachusetts Supreme Judicial Court has stated its position with respect to the nature of the *de novo* trial:

> It is reasonable to conclude that the Legislature intended that, upon appeal [Mass. Gen. Laws ch. 278, §18], *the question of guilt, the sentencing power and all related matters* be transferred to the Superior

[10] See Mass. Gen. Laws ch. 218, §27A and ch. 278, §18A which are reprinted in Appendix B.

[11] It should be noted that the "appeal" provision considered by the Supreme Judicial Court in *Commonwealth* v. *O'Neil,* was "Rev. Sts. c. 85, §28, and c. 138, §1," a predecessor, of identical substance, it is suggested, to Mass. Gen. Laws, ch. 278, §18.

> Court for *determination* completely divorced from the record of the prior trial. *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). [Italics added.]

And, appellee suggests that this available and elected *redetermination* of the question of guilt, sentencing and all related matters of appellant's district court trial contraindicates that the district court "judgment" be construed as an effective determination of the litigation. The judgment in appellant's district court case was, and is, subject to further review in a state tribunal, as it is subject to an available *redetermination*.

2. *Further Appellate Review Is Available Within The Massachusetts Court System.*

The appellant had available to him a traditional avenue of obtaining appellate review of the action of the district court in denying the motion for jury trial. This constitutional issue could have been raised in the Massachusetts Superior Court by motion to dismiss the complaint prior to trial.[12] If such a motion were made, and subsequently denied, and if the appellant were then found guilty, he would have had available to him an opportunity for appellate review of the ruling on this motion as a matter of right by saving and perfecting exceptions thereto and proceeding with the same to the Massachusetts Appeals Court, and, possibly to the Supreme Judicial Court. See *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. 1403, 316 N.E.2d 610 nn. 1, 3.

Admittedly, the availability of this ordinary review under the method of exceptions and appeal would be viable only in the event that the appellant were not acquitted, and

[12] "The foundation of the jurisdiction of the Superior Court in a criminal case coming before it on appeal is the complaint made in the District Court." *Commonwealth* v. *Duggan*, 257 Mass. 465, 69 (1926).

that his properly presented motion to dismiss the complaint had been denied at the superior court level. However, the Commonwealth suggests that an appellant to this Court under 28 U.S.C. §1257(2) must avail himself of the appellate remedies that exist at the state level for consideration of the constitutional issues that are presented to this Court.

The appellee recognizes that this Court's decision in *Largent* v. *Texas*, 318 U.S. 418 (1943), appears to be authority contrary to the position argued by appellee. In *Largent* it is reasonable to conclude that a rule was established by which a lower court's judgment would be considered "final" for purposes of §1257 review if the state's procedure provided no method of reviewing the defendant's conviction *on the record made in the lower court*. And, appellee recognizes that the statement of the Massachusetts Supreme Judicial Court in *Mann* v. *Commonwealth, supra*, appears to indicate that the superior court procedure will not constitute a review on the district court record (". . . completely divorced from the record of the prior trial." 359 Mass. at 664.

However, appellee suggests that a mechanical application of the language of *Largent* would ignore the substantive nature of the Massachusetts procedure and the substantive fact to which there seems no dispute: the litigation in the district court has not, at the election of the appellant in this case, been effectively determined. Although the *record* of the district court may be unreviewable in the Superior Court, the substantive *decisions* made by the district court seem to be substantively non-final.

B. *The Judgment Herein Appealed Is Not A Judgment Rendered By The Highest Court Of Massachusetts In Which A Decision Could Be Had.*

It is clear from the decisions of this Court that a judgment need not be from a state's highest court (by whatever

name under local practice) in order to be appealable under 28 U.S.C. §1257(2). See *Powell* v. *Texas*, 392 U.S. 516 (1968); *Grovey* v. *Townsend*, 295 U.S. 45 (1935). The test seems not to be one of the particular description or designation which may be applied to the tribunal by state statute, but rather, whether the possibilities afforded by state procedure for review by all state tribunals have been exhausted:

> * * *
>
> Hence, it is the last state tribunal—* * *—to which the cause could be brought for review which is the 'highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute. . . . *Gorman* v. *Washington University*, 316 U.S. at 100-01.

The appellee suggests that the "decisions" of the Boston Municipal Court in this case are two:

(1) the adjudication of the appellant's guilt; and,
(2) the denial of the appellant's motion for a jury trial.

And, the appellee suggests that each of these decisions is susceptible of further review and revision under Massachusetts statutes and practice. The adjudication of guilt can be re-litigated in the Superior Court before a jury of twelve, or re-litigated in the Boston Municipal Court before a jury of twelve. Re-litigation is also available in either of these courts, without a jury. The defendant may, if convicted in either of these courts, then take an appeal, as of right, to the Massachusetts Appeals Court and, or alternatively, apply for further or substituted hearings before the Massachusetts Supreme Judicial Court. See discussion *infra*, Appendix A.

As to the question of the propriety of the Boston Municipal Court's ruling upon the motion for jury trial, the question may be raised, as of right, in the Superior Court (see Appendix A; *Whitmarsh* v. *Commonwealth, supra*) and again, as of right, in either the Appeals Court or the Supreme Judicial Court.

In brief, the two decisions made by the Boston Municipal Court are not "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. at 551. The decision as to the appellant's guilt is subject to redetermination; the decision upon the motion for jury trial is subject to review, correction and modification. The appellee suggests that the decision of the Boston Municipal Court did not dispose of the charge and is, in this respect, distinguishable from *Largent* v. *Texas, supra*.

III. Constitutional and Statutory Citations

The constitutional provisions and statutes involved in this case are the following:

> Fourteenth Amendment of the United States Constitution, Section I;
> Article XII, Constitution of Massachusetts;
> Title 28, United States Code, Section 1257;
> Massachusetts General Laws, Chapter 218, Section 27A;
> Massachusetts General Laws, Chapter 278, Section 18; and,
> Massachusetts General Laws, Chapter 278, Section 18A.

Each is set forth in Appendix B, *infra*.

IV. Question Presented

Whether or not the Massachusetts criminal jury procedure adequately complies with the Fourteenth Amendment requirement that an accused be afforded the right to trial by jury in state criminal proceedings.

V. Statement of the Case

Appellant Steven Costarelli was complained against in the Municipal Court for the City of Boston on January 23, 1974, for violation of Mass. Gen. Laws, Ch. 90, §24, commonly referred to as "unauthorized use of automobile". (App. 6A). On that date, the appellant, then defendant, pleaded not guilty and the trial of the case was scheduled for February 6, 1974. On February 6, 1974, prior to trial, the appellant filed a "Motion for Jury Trial," and the case was, on that date, continued for trial until February 27, 1974. (App. 6A). On February 27, 1974, the case was called for trial, the motion for jury trial was denied, the appellant was found guilty, and the appellant was sentenced to a house of correction for a term of one year. (App. 6A-7A). On that date and at that time the defendant "appealed" the finding of guilty, although the record does not disclose whether the appeal was taken pursuant to Mass. Gen. Laws, Ch. 278, §18, or Mass. Gen. Laws, Ch. 278, §18A. (See Appendix B.) The record before this Court is devoid of any indication of the further disposition of the case.

VI. Summary of Argument

1. The right of jury trial in criminal cases is a fundamental right, guaranteed to defendants in state courts by virtue of the Fourteenth Amendment. *Duncan* v. *Louisiana,*

391 U.S. 145 (1968). However, *Duncan* did not make the rule of *Callan* v. *Wilson,* 127 U.S. 540 (1888), applicable to the states; that is, first-instance-every-instance jury trial is not mandatory in all state criminal proceedings. *Duncan* enunciated a right, without definitively establishing the mode in which the right is to be afforded state defendants, and the Massachusetts mode of criminal jury trial procedure complies with the *Duncan* requirement because it is a basic and fundamental mode; that is, a mode which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense. The Massachusetts mode is clearly basic and fundamental because it antedated, and remained viable during, the colonial-constitutional period. Additionally, several states, including New Hampshire, Vermont, Connecticut, Rhode Island and Maine (as a District) employed a similar trial *de novo* procedure during the same period as a means of furnishing jury trial to defendants within their jurisdictions. Finally, the Massachusetts procedure is comparable to contemporary developing jury procedures in several states, and this Court has considered contemporary state practice as a principle of Fourteenth Amendment application.

2. This Court in the cases of *Duncan* v. *Louisiana, supra, Williams* v. *Florida,* 399 U.S. 78 (1970), and *Apodaca* v. *Oregon,* 406 U.S. 404 (1972), analyzed certain traditional aspects of the jury-trial right with respect to the function and purpose of a jury in American jurisprudence. Appellee suggests that the primary purpose of the jury is to prevent governmental oppression by the interposition of the commonsense judgment of laypersons between an accused and his accuser, and by effecting community participation in the process of adjudication of guilt or innocence of an accused. Appellee further suggests that an accused in Massachusetts has an absolute

right to a jury, regardless of the "petty nature" of his offense, and that the *de novo* procedure, though possibly inconvenient to some, is beneficial to the large majority of defendants and contraindicates a suggestion of governmental oppression. The Massachusetts jury procedure fulfills the purpose and function of criminal jury trial in America.

3. The right to a speedy trial, a fundamental right, is not an appropriate issue in this case. If this Court determines that the concept of "jury" embraces first-instance-every-instance jury trial, then a consideration of the appellant's speedy-trial claim becomes unnecessary. Alternatively, should this Court agree that the Massachusetts criminal jury procedure complies with the *Duncan* requirement, the record in this case fails to disclose any measurable period of time which can be assessed against the criteria of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Finally, the appellant has conceded that the "delay" in this case is "short". The appellant was not deprived a speedy jury trial.

4. The appellant's alternative contention with respect to the Double Jeopardy Clause is controlled by this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Colten* v. *Kentucky*, 407 U.S. 104 (1972). In Massachusetts, as was the case in Kentucky, a defendant in a criminal trial "appeals" to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 406 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second tier is absolute, and, at the defendant's behest, the lower court proceedings are "wiped out" entirely. On the basis of this Court's previous decisions, Massachusetts suggests that its *de novo* trial procedure does not violate the Double Jeopardy Clause.

VII. Argument

THE MASSACHUSETTS CRIMINAL JURY PROCEDURE ADEQUATELY COMPLIES WITH THE FOURTEENTH AMENDMENT REQUIREMENT THAT AN ACCUSED BE AFFORDED THE RIGHT TO TRIAL BY JURY IN STATE CRIMINAL PROCEEDINGS.

I. The Massachusetts Procedure Provides Jury Trial in a "Basic and Fundamental" Mode.

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court, in examining a state's procedure which dispensed entirely with a jury trial in serious criminal cases,[13] stated the following:

> • • • Because we believe that a trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. [Footnote omitted.] 391 U.S. at 149.

The Commonwealth of Massachusetts suggests, at the outset, that *Duncan* did not establish a requirement that state jury procedures conform to all previous decisions of this Court interpreting the right to jury trial guaranteed to defendants in criminal cases in federal courts by Ar-

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[13] "None of these cases [*Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)], however, dealt with a State which had purported *to dispense entirely* with a jury trial in serious criminal cases." 391 U.S. at 154-55. [Italics added.]

ticle III of the United States Constitution and by the Sixth Amendment.[14] This argument is written upon that understanding and assumption, with the proviso that if this Court is to hold that *Duncan* requires the states to conform to the cases that determine federal jury-trial right, then the doctrine of *Callan* v. *Wilson*, 127 U.S. 540 (1888), should be re-assessed, or, alternatively, made explicit.[15] In brief, appellee argues, on the basis of its understanding, that *Duncan* secured a right, without defining precisely the mode in which it shall be enjoyed.[16]

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[14] The appellee recognizes that its position is not free from contrary interpretation and suggests that the Massachusetts Supreme Judicial Court has reviewed the alternatives and that the same are contained in succinct and fair summary in the case of *Whitmarsh* v. *Commonwealth*, *supra*, at 1412-16. We concur with the views of Mr. Justice Powell as expressed in his concurring opinion in *Johnson* v. *Louisiana* and *Apodaca* v. *Oregon*, 406 U.S. 356, 369-77 (1972), wherein he stated:

> But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury-trial right with all its gloss.

[15] * * * It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision.* * * 391 U.S. at 158-59, n. 30.

[16] In *Jones* v. *Robbins*, 8 Gray 329 (1857), in which the principle question involved was whether a person could be sentenced to state prison without a grand jury indictment, the Supreme Judicial Court said:

* * *

> The last clause, which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a "capital" or "infamous punishment," excepting for the government of the army and navy, without trial by jury, is somewhat more explicit than the preceding clause, "judgment by his peers," and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to ensure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. *Emerick* v. *Harris*, 1 Binn. 416. *Murphy* v. *People*, 2 Cow. 815. *Jackson* v. *Wood*, 2 Conn. 819. *Beers* v. *Beers*, 4 Conn. 535. *Sullivan* v. *Adams*, 3 Gray 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury. *Id.* at 341-42.

Appellee suggests that the conclusion of *Duncan* seems to derive from an examination and application of criteria which had previously served as the basis for this Court's determination that various rights extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings were also to be protected against state action by the Fourteenth Amendment. 391 U.S. 147-49. Specifically, the Court re-visited earlier "Fourteenth Amendment" decisions, and said:

> * * * The question has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' "

> *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932),[17] whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965).* * *

391 U.S. at 148-49.

The Court noted that recent cases had varied from the "essence of a scheme of ordered liberty" test (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)), and

> . . . proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.* * *[18]

391 U.S. 149-50 n. 14, and further,

> * * * Of each of these determinations [19] that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not

[17] Quoting from *Herbert* v. *Louisiana*, 272 U.S. 312, 316 (1926).

[18] The Court referenced to the following cases: *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Griffin* v. *California*, 380 U.S. 609 (1965); *Robinson* v. *California*, 370 U.S. 660 (1962); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948); *Pointer* v. *Texas*, 380 U.S. 400 (1965); and, *Washington* v. *Texas*, 388 U.S. 14 (1967).

[19] Cases in footnote 18, *supra*.

> necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States. *Ibid.*

Appellee suggests that the Court then, in *Duncan*, based upon this initial definition of "fundamental", further refined the "Fourteenth Amendment" application criteria in terms of (1) historical analysis of jury trial in criminal cases and, (2) contemporary practices among the states.[20] Appellee now argues and suggests to this Court that the criteria of Fourteenth Amendment *application* may be equally relevant for Fourteenth Amendment *justification*, and that the Massachusetts jury procedure is, itself, a basic and fundamental procedure which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense, as well as in the light of contemporary developing jury procedures of several American States. In brief, if the Fourteenth Amendment requires that a limitation be imposed, or a procedure be secured, upon these criteria, Massachusetts suggests that its existing procedure can be justified as adequate by the same criteria, providing a basic and fundamental right in a basic and fundamental mode.

A. *The Colonial-Constitutional Experience*

The Massachusetts practice of affording criminal defendants a jury trial after preliminary adjudication by a judge (or magistrate) acting alone was first codified in

[20] The Court reviewed the history of trial by jury in criminal cases by reference to historical treatises and legislative history of the debates and amendments surrounding various federal provisions, and indicated, as well, that the constitutions adopted by the original states were examined. 391 U.S. at 151-53. The Court also referenced contemporary state law with respect to the right to jury trial in serious criminal cases. 391 U.S. at 154.

1647 when the General Court enacted a provision affording all persons the "libertye" of an:

> Appeal from the sentence of one magistrate . . . and if the point of appeal be in matter of law then to be determined by the bench; if in matter of fact by the bench and jury.

THE BOOK OF THE GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS, PUBLISHED IN CAMBRIDGE ACCORDING TO AN ORDER OF THE GENERAL COURT 2 (1660). Our research of legislation enacted since 1647 discloses that this provision has never been repealed and that the trial *de novo* procedure, with some modification, has continued in use from that date to the present.[21] See *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. at 1411; *Jones* v. *Robbins*, 8 Gray 329, 341 (1857). The right of "appeal" was clearly not an unfettered one in colonial pratice and has been the subject of critical commentary. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 938-44 (1926).[22]

[21] Ch. 51 §3 [1783] Mass. Stat.; Ch. 70 § 1 [1831] Mass. Stat.; Ch. 85 §28, Ch. 87 §36, Ch. 138 §1 [1836] Rev. Mass. Stat.; Ch. 166 §2 [1845] Mass. Stat.; Ch. 31 [1849] Mass. Stat.; Ch. 116 §32 and Ch. 173 §§1, 4 [1860] Mass. Gen. Stat.; Ch. 154 §39 and Ch. 155 §§58, 61 [1882] Mass. Pub. Stat.; Ch. 396 §47 [1893] Mass. Stat.; Ch. 431 [1894] Mass. Stat.; Ch. 490 §3 [1897] Mass. Stat.; Ch. 219 §22 [1902] Mass. Rev. Laws; Ch. 319 [1905] Mass. Stat.; Ch. 652 [1913] Mass. Stat.; and Ch. 216 §4 [1929] Mass. Stat.

[22] However, we suggest that the authors' research does not seem to include the historical fact that many of the impediments to an actual exercise of the jury-trial right had been eliminated during the colonial period and prior to the framing of the Massachusetts and Federal Constitutions. See, *e.g.*, Ch. 4, Acts and Resolves of 1724-25 (permitting amendment to the appeal so as to preclude dismissal on technical grounds); Ch. 15, Acts and Resolves of 1741-42 (eliminating requirement that a writing containing the reasons of appeal

The exact parameters of the procedure in early practice as regards magistrates' subject-matter jurisdiction and limitations upon the punishments that might be imposed are elusive and, in some respects, difficult to establish categorically in modern terms due to the fragmented approach of early legislators in codifying the criminal law and incommensurabilities arising from social, economic, and technological change. However, after a review of the legislation of the colonial and constitutional periods, it appears fair to state that, at least with respect to the core offenses against the public order and peace, against property, and against persons, the matters entrusted to the trial *de novo* procedure then, and those entrusted to the procedure now, are quite comparable. For example, during the colonial and constitutional experience, justices of the peace, sitting outside the General Sessions of the Peace, were authorized to proceed to a preliminary adjudication in cases where the offense was: participation in a riotous or tumultuous assembly where a building was torn down;[23] a liquor law violation;[24] an assault and battery not of a "high and aggravated nature";[25] receiving

be filed or produced). The latter provision reduced costs based upon the number of pages filed. See Ch. 23, Acts and Resolves of 1775-1776. Also, appellee has calculated that forty of the fifty-nine shillings were for jurors fees and that these fees need not have been advanced, nor would have been assessable against the defendant, in the event of an acquittal. In general, see preambles to these ameliorative acts for reflection of a legislative concern that the appeal right be unfettered.

[23] Ch. 17, Acts and Resolves of 1750-51 (maximum punishment: whipping, one year imprisonment in the county house of corrections at hard labor, and another public whipping every three months during the term of imprisonment); Ch. 26, Laws and Resolves of 1794 (re-enactment with some modification). See *Commonwealth* v. *Twombly*, Boston Municipal Court 1830, reported in Thatcher's Criminal Cases 225 (1845) (Thatcher, J., reviewing common-law and legislative history of the offense.)

[24] Ch. 6, Acts and Resolves of 1742-43 (maximum fine: twenty pounds sterling).

[25] Ch. 51, Laws and Resolves of 1783.

stolen government property;[26] or, a petty larceny or offense of similar degree.[27]

Today, the district and municipal courts of Massachusetts, the successor courts to the General Sessions of the Peace, continue to have jurisdiction over these offenses which still are among those that mark the jurisdictional limits of the authority of these courts. See Mass. Gen. Laws, Ch. 218, §26; Ch. 267, §7; Ch. 265, §13A; Ch. 266, §§ 30, 60.

The New Hampshire two-tier jury procedure has been traced by that state's Supreme Court to a 1646 law of the Massachusetts Colony, *State* v. *Jackson,* 69 N.H. 511 (1898), although it is clear that the New Hampshire practice enjoys a history separate and apart from the Massachusetts law:

> * * * In 1679, immediately after Charles II discontinued the jurisdiction of Massachusetts in the New Hampshire territory, the general assembly of the Province of New Hampshire enacted, "That Any one of the Council [that is, the council provided for by the King's Commission to President Cutt] may hear & determine such smaller Thefts & pilferings, as exceed not the damage or fine of fforty shillings; or penalty of Stocking or Whipping, not exceeding Ten stripes; or only legal admonition, as he shal see cause; Saving liberty of Appeal to the Delinquent." 1 Laws, *ed.* of Batchellor, editor and compiler of Early Province and State Papers, *p.* 17, *s.* 7. By another enactment this jurisdiction was extended to all criminal cases in which the punishment did not exceed that above mentioned. *Ib., p.* 22, *s.* 24.

69 N.H. at 514.

Several decisions of the New Hampshire Court seem to best describe the office of the justice of the peace in New Hampshire, the criminal jurisdiction of the justices at the time of the formation of the New Hampshire Constitution in 1784, and the modification of the jurisdiction of the justices during the period following the revolution. See, *Opinion of the Justices,* 41 N.H. 550 (1860); *State* v. *Ray,* 63 N.H. 406 (1885); *State* v. *Griffin,* 66 N.H. 326 (1890); *State* v. *Gerry,* 68 N.H. 495 (1896); *State* v. *Jackson, supra; Wilmarth* v. *King,* 74 N.H. 512 (1908); *State* v. *Ring,* 106 N.H. 509 (1965); *State* v. *Despres,* 107 N.H. 297 (1966). And, although the cases have concerned, in large measure, the scope of jurisdictional authority which may be delegated to the municipal or district court in view of Article V of the Bill of Rights of the New Hampshire Constitution,[28] it seems fair to say that the New Hampshire Court has never questioned the historical precedent of two-tier criminal adjudication, "provided the

[26] Ch. 36, Acts and Resolves of 1776-77 (maximum fine: three-times value of property stolen).

[27] THE BOOK OF THE GENERAL LAWS AND LIBERTYES OF THE INHABITANTS OF MASSACHUSETTS, supra, at 7 (maximum punishment in 1660: whipping and fine of up to forty shillings; but, by the end of the constitutional period the maximum fine had been increased to twelve hundred eighty shillings. Ch. 37, Acts and Resolves of 1779-80).

Our research has disclosed that long-term imprisonment was rarely imposed in colonial Massachusetts. The one exception appears to be the three-year term authorized for mailing a threatening letter to extort. Ch. 7, Acts and Resolves 1749-1750. Otherwise, excepting for the imposition of heavier fines, the penalty of next severity (outside of the jurisdiction of a justice of the peace) appears to have been the death penalty. See, *e.g.*, Ch. 2, Acts and Resolves of 1721-1722 (death penalty for second offense of trading with the Indians); and, Ch. 18, Acts and Resolves 1736-37 (death penalty for third offense of theft).

[28] The provision of the constitution relied upon is as follows: No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land. N.H. Const., Bill of Rights, art. 15.

right to trial by jury, such as the Constitution intends, is secured to everyone in the last resort . . . ," *Opinion of the Justices,* 41 N.H. at 552, and "final judgment cannot be enforced for the commission of any police offense, however trivial, until the appellant has been convicted by a jury of his peers." *State* v. *Ray,* 63 N.H. at 407.

In and prior to 1784, a New Hampshire justice of the peace had general authority to try and determine those criminal offenses that were punishable by a fine not exceeding forty shillings, by whipping or sitting in the stocks. *Wilmarth* v. *King,* 74 N.H. at 513. However, specific statutes authorizing the punishment of six months imprisonment by a justice of the peace are to be found, even antedating the constitution. New Hampshire Laws, 63, 64, 65 (1780). See *Wilmarth* v. *King, supra.* See also, New Hampshire Laws, Ch. 45, §§ 3, 4 (1828). Finally, the appellee suggests that the nature of the following offenses within the jurisdiction of the justices of the peace should be noted (these examples all being laws of 1771 cited in *State* v. *Jackson,* 69 N.H. at 516-17): drunkenness; stealing (where the damage did not exceed forty shillings); "affrayers, rioters, disturbers or breakers of the peace . . ."; striking or smiting another; and, "assaulting a woman in the fields, streets or lanes . . . ."[29]

Decisions of the Supreme Court of Vermont, and some available portions of early Vermont legislation, establish that two-tier criminal jury procedures were a part of the constitutional experience in Vermont.

> The first constitution of Vermont was adopted in 1777. The act of the legislature of 1786 empowered the justices of the peace to try certain pleas and actions of a criminal nature, and limited their jurisdiction. It also provided that every person . . . aggrieved by the sentence of a justice in a criminal action, might, on giving security, remove the cause by *certiorari,* to the supreme court (where there was then a trial by jury.) [sic] there to be tried on the merits. The act of 1789 allowed an appeal from the judgment and sentence of a justice to the county court in all criminal causes.

[29] The fines and penalties for these offenses are contained in the opinion of the court at 69 N.H. 516-17.

State v. *Peterson,* 41 Vt. 504, 520-21 (1869). The "county court" was a jury court. See "An Act Regulating Juries and Jurors, 22 Feb. 1779", reprinted in XII Laws of Vermont 1777-1780, at 117 (Soule, ed. 1964). See also *Lincoln* v. *Smith,* 27 Vt. 328 (1855); Act of June 21, 1782, reprinted in XIII Laws of Vermont 1781-1784, at 102-03 (Williams, ed. 1965).

Our research discloses that the states of Connecticut and Rhode Island and the District of Maine similarly employed a trial *de novo* procedure for furnishing, during the colonial period, jury trial to criminal defendants who were tried first before a magistrate or justice of the peace without a jury. In Connecticut that procedure seems to date from at least 1702. See *Goddard* v. *State,* 12 Conn. 448, 454 (1838); Colonial Records of Connecticut 1689-1706, at 545. In Rhode Island our earliest reference is 1718. Acts and Laws of Rhode Island, 1663-1767, at 36, 44 (1767).[30]

[30] Again, the appellee requests that the Court note the nature of the offenses for which the trial *de novo* procedure was provided in jurisdictions where the defendant was given a general right to a trial by jury subsequent to a preliminary adjudication by a magistrate or magistrates. For further example, in the colonial practice of Rhode Island, a preliminary summary adjudication was provided for in cases of a theft not exceeding ten pounds sterling (for which the defendant might be punished by "whipping, fining, and banishing" just as if the conviction had been by a jury verdict at the General Sessions of the Peace), assault and battery, and firing a gun or throwing fireworks into a crowd. Acts and Laws of Rhode Island 1663-1767, at 41, 64, 120 (1767).

And, in the District of Maine, 1783. See *State* v. *Sklar*, Me. 317 A.2d 160, 170 (1974); *Johnson's Case*, 1 Me. 230 (1821). There is also evidence that a trial *de novo* procedure for providing a jury trial was employed in some form in Pennsylvania, Virginia and Delaware during the colonial and constitutional periods.[31]

[31] Our research of Pennsylvania legislation of the colonial and constitutional periods does not disclose a uniform jury practice in the case of all criminal offenses. There was, however, provision for a general right to appeal to the Quarter Sessions for a jury trial in quasi-civil proceedings. Act of February 21, 1736, reprinted at 4 Statutes at Large of Pennsylvania 291 (limiting the jurisdiction of justices of the peace at five pounds sterling, with a right of appeal to a jury in cases involving over forty shillings).

In addition, a trial *de novo* procedure for furnishing a jury trial was, with fair consistency, provided for criminal offenses of intermediate seriousness. See *e.g.*, Act of August 21, 1719, reprinted at 3 Statutes at Large of Pennsylvania 229, 233-34; Act of February 24, 1721, reprinted at 3 Statutes at Large of Pennsylvania 246 (petty larceny punishable by twenty shilling fine, whipping and imprisonment); Act of August 15, 1730, reprinted at 4 Statutes at Large of Pennsylvania 194 (blocking a river); Act of October 4, 1788, reprinted at 13 Statutes at Large of Pennsylvania 160 (commercial fishing law violations punishable by a five pound fine or two months imprisonment); Act of April 22, 1794, reprinted at 15 Statutes at Large of Pennsylvania 110, 115-16 (keeping a gambling establishment punishable by a fine of twenty-six dollars).

The use of the trial *de novo* procedure for furnishing a jury trial where it is constitutionally required in quasi-civil actions has been considered and affirmed by the Pennsylvania Supreme Court. *Emerick* v. *Harris*, 1 Binney 416 (1808).

The cornerstone of Virginia's criminal justice system was the monthly court which was formed in 1623 with the appointment of eight designated commissioners, of whom three were to be a quorum. Act of March 20, 1629, reprinted at 1 Hening's Statutes at Large 132 (1823); Act of March 1, 1631, reprinted at 1 Hening's Statutes at Large 168-169 (increasing jurisdiction to causes involving up to five pounds sterling excepting those involving life or limb). In 1642 the monthly courts became county courts and a single commissioner was given cognizance of causes involving twenty shillings or two-hundreds pounds of tobacco or less. Act of June, 1642, reprinted at 1 Hening's Statutes at Large 273. Also, in 1642, all persons were given what appears to have been an unqualified right to a jury trial. *Ibid.*

In 1645 the Virginia "county courts" were given jurisdiction of all cases and ordered to make jury trials available. Act of November

In partial summary, although there may have been no strict consensus among the colonies as to the mode in which the right to jury trial was to be afforded, the trial *de novo* mode for offenses of intermediate seriousness was a very substantial part of the colonial experience and was, appellee suggests, clearly within the under-

20, 1645, reprinted at 1 Hening's Statutes at Large 303. It is not clear how the last three acts were reconciled in practice. Possibly, a trial *de novo* procedure had already been implemented. In any event, a trial *de novo* procedure for furnishing a jury trial was formally implemented in 1658. Act of March 13, 1658, reprinted at 1 Hening's Statutes at Large 435. Appellee notes that the subject matter jurisdiction of one and two commissioners at a preliminary adjudication was increased to three hundred fifty and one thousand pounds of tobacco respectively with the implementation of these procedures. We must further note that the Virginia legislation during this period did not distinguish between criminal and civil actions procedurally, all penal laws being enforced through *qui tam* proceedings involving informers as well as victims.

This practice was to be short-lived, however. In 1661 a new colonial government, averring a reverence for the common law of England, adopted that law, repealed all previous laws, provided that the commissioners were from then on to be called "justices of the peace" and have the same powers as English justices, and reduced their jurisdiction in summary proceedings to causes involving twenty shillings or two hundred pounds of tobacco, or less, in which causes their judgment was to be "final." Acts of March 23, 1661, reprinted at 2 Hening's Statutes at Large 41, 61-62, 72. It does not appear that Virginia again established a trial *de novo* procedure until the post-constitutional period.

The post-constitutional procedure was held valid under the Sixth Amendment and the Virginia Constitution on the ground that the right to a jury trial is afforded if an unfettered right of appeal is provided. *Brown* v. *Epps*, 91 Va. 726 (1895) (distinguishing *Callan* v. *Wilson*, *supra*, on the ground that Article III, Section 2 of the United States Constitution requires that all federal trials "shall be by jury" which literally leaves no room for any adjudication in the absence of a jury).

Information on early Delaware practice is quite sparse. Much of the early penal legislation is somewhat cryptic. It is clear that the Delaware justices of the peace had jurisdiction over some offenses of intermediate seriousness, and although a right to appeal for a trial by jury in the quarter sessions is not expressly given for all offenses, the right is expressly afforded in the more comprehensive legislative enactments and in language that suggests the right may have been generally available. Laws of the Government of New

standing of the framers of our Federal Constitution. Indeed, we suggest that the *de novo* mode was within the experience and understanding of those whose precepts as regards the jury-trial right were the more developed: in the "*de novo* states" it appears that jury trial was provided for *all* offenses, petty and serious.

B. *Contemporary State Practice*

The contemporary practices of the states with respect to jury trial have been the subject of examination by this Court in several recent cases, notably: *Duncan* v. *Louisiana, supra; North Carolina* v. *Pearce, supra; Baldwin* v. *New York, supra; Williams* v. *Florida, supra; Apodaca* v. *Oregon, supra;* and *Colten* v. *Kentucky, supra.* And our examination of the parties' briefs in these cases indicates that the Court has received considerable analysis, on a state-by-state basis, of the criminal jury procedures of most of the states. See, *e.g., Duncan* v. *Louisiana, supra;* Brief for Appellant, pp. 3a-8a; Brief for Appellee, pp. 101-113.

The appellee has examined contemporary state practice and suggests that a *de novo* procedure, comparable to the Massachusetts procedure, is currently being utilized

Castle, Kent and Suffolk upon Delaware 1700-1749, at 139, 159, 184, 194, 218 (Franklin and Hall, eds. 1752); Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1753-1762, at 146, 316, 321, 323 (Adams, ed. 1763) (with October 1763 Session to October 1774 Session Supplements).

Records of legislative enactments, or case law, or both, concerning the colonial and constitutional periods were available to appellee for New York, Maryland, New Jersey and Georgia. A search of this material did not disclose the use of a trial *de novo* procedure for providing a jury trial or a provision for a general right to a jury trial in these states. Complete records of the colonial practice of South Carolina and North Carolina were not available. However, it is known that North Carolina provided a trial *de novo* procedure for offenses of intermediate seriousness as early as 1868. See *State* v. *Powell*, 86 N.C. 640, 642 (1882).

by several states including, at least, Arizona,[32] Arkansas,[33] Alabama,[34] Kansas,[35] North Carolina,[36] New Hampshire,[37] Pennsylvania[38] and Virginia.[39] Appellee acknowledges that the ostensible jurisdiction of the Massachusetts

[32] Ariz. Rev. Stat. §§22-371 through 22-374 establish the *de novo* appeal to the superior court from the final judgment of a justice or police court; however, the "appeal" is not always *de novo*, *i.e.*, if a transcript of the proceedings in the lower court has been maintained, the "appeal" may be upon that record based upon the superior court's evaluation of the sufficiency and condition of that record. The jurisdiction of the justice of the peace courts is contained in Ariz. Rev. Stat. §§22-301.

[33] Ark. Stat. §§44-115, -116, -501 and -509 establish the *de novo* procedure of appeal to the circuit court. See *Cableton* v. *State*, 243 Ark. 351, 359 (1967). However, the initial jurisdiction of the lower "tier" appears to be restricted to violations of municipal by-laws and ordinances. See Ark Stat. §§44-115, -116.

[34] See Ala. Const. art. I, §§6, 11 (1901). The jurisdiction of the first tier (the "county court") is defined in Ala. Code Ann. tit. 13 §321; see *Leonard* v. *State*, 43 Ala. App. 454 (1966) and Ala. Code Ann. tit. 1 §7 and tit. 13 §326. The latter citation appears to define the *de novo* right. Appellee also notes that second degree manslaughter appears to be a misdemeanor in Alabama and subject to adjudication, in the first instance, at the lower court level without a jury.

[35] The *de novo* procedure appears in Kan. Stat. Ann. §§22-3609, -3610. See *State* v. *Parker*, 213 Kan. 229, 230, 233, 235 (1973).

[36] N.C. Gen. Stat. §§7A-177.1, -196, -271, -272, 15-290.

[37] The *trial-de-novo* procedure and enabling legislation is explained in *State v. Despres*, 107 N.H. 297 (1966). See N.H. Rev. Stat. §§502:18, 502A:11, 502A:12. The jurisdiction of the district or municipal first tier is limited to crimes for which the maximum penalty is fine not exceeding one thousand dollars or imprisonment not exceeding one year or both. *Ibid.*

[38] Pa. Code tit. 234, Rules 51, 67, 6001, 6006, 6010. The municipal court has jurisdiction of all criminal offenses where the punishment that might be imposed is five years or less. After the imposition of sentence the municipal court judge shall notify the defendant of his right to appeal for a trial *de novo* by jury. If the defendant does appeal, the district attorney must proceed to a grand jury and, upon return of an indictment, proceedings continue as in other cases involving indictable offenses.

[39] Va. Code Ann. §§16.1-123, -124, -125, -132, -136. See *Commonwealth* v. *Blais*, 113 Va. 760 (1912). In Virginia, any person convicted in a court not of record, of an offense not felonious, has a right to a *de novo* jury trial in a circuit court (even if the conviction resulted from guilty plea, rather than trial).

"first tier" seems to represent (with the possible exception of Alabama) the extreme with respect to powers of fines and incarceration. However, the concept of *de novo* adjudication, in a procedure comparable to the Massachusetts system in respects other than potential sentencing, seems to be recognized as a legitimate form of jury procedure by a substantial number of states.[40]

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[40] Appellee has suggested, and, hopefully established, that the subject matter or "core offenses" cognizable by colonial justices of the peace are substantially comparable to the subject matter jurisdiction of the present Massachusetts District Courts and the Boston Municipal Court. It does appear, however, that the *ostensible* authority of the modern justice has been substantially expanded in terms of money fine amount and potential time of incarceration. This is, of course, an important consideration, especially in view of the recognized distinction between "petty" and "serious" offenses and the doctrine of *Callan* v. *Wilson*, *supra*. Appellee argues, however, that the practical expansion of "lower tier" jurisdiction is justified by social, technological and procedural advance, as well as by need, but further, that the *actual* expansion is far less than the *apparent* expansion.

The expansion of magistrates' jurisdiction was examined by the New Hampshire Supreme Court in *State* v. *Jackson*, *supra*. That court noted that, with some exceptions, in 1777 the largest fine which a New Hampshire justice was authorized to impose was forty shillings, and that the longest definite term of imprisonment was three months, ". . . authority being given in certain cases to imprison in the house of correction for an indefinite term; . . ." 69 N.H. at 518. That court, in 1898, undertook to interpret the 1777 sentencing power in terms of subsequent authority of the justices in 1791, 1799, 1805, 1815, 1822, etc. The interpretation and examination took this form:

> In 1781, the Spanish milled dollar reckoned as six shillings, and other silver and gold in proportion, were made legal tender on all contracts made after that time, and for all debts contracted prior to the last day of January, 1777. Laws, *ed.* 1789, *pp.* 185, 187. The constitution provides that, in all cases where sums of money are mentioned in it, "the value thereof shall be computed in silver at six shillings and eight pence per ounce." Laws, *ed.* 1789, *p.* 30. Const., *art.* 96. It seems from the act of February 12, 1785, that the value of gold at that time was five pounds six shillings eight pence per ounce, or, when compared with silver, as sixteen to one. Laws, *ed.* 1780, *p.* 338; *ed.* 1789, *p.* 187. The money of account was changed from the English system to the decimal or United States system in 1792 (Act of Congress of April 2, 1792, *c.* 16, *s.* 20; Laws, *ed.* 1797, *p.* 267); and the first United States silver dollar was coined in 1794. This dollar contained 371¼ grains of pure silver,—about the same quantity as the Spanish milled dollar. According to the rule of the constitution, forty shillings equaled six ounces of silver,—a quantity sufficient to make seven and three fourth United States Silver dollars.

69 N.H. at 518-19.

Appellee includes this New Hampshire analysis primarily to establish that a dollar-for-dollar comparison is difficult, if not totally impractical. Nevertheless, appellee asks that this Court, if such comparison be made, take note of the fact that the Chief Judge of the Vermont County Court was paid at the rate of ten shillings per day in 1780, and that an attorney in that court received for his labor four shillings per day. "An Act for Regulating Fees Novr. 3RD 1780" reprinted in XII Laws of Vermont 1777-1780, at 206. (Soule, ed. 1964).

And, should this Court compare the extreme of the present authority of a Massachusetts District Court Judge to imprison, the appellees ask that the following statement of the Rhode Island Supreme Court be noted:

> Suffice it to say that at the time of the adoption of the State constitution [1843] imprisonment in the State prison was the gravest punishment known to the law of the State for crimes less than capital crimes, and that it had succeeded to the former punishments of whipping, branding, and standing in the pillory.

State v. *Nichols*, 27 R.I. 69, 82 (1905).

In summary, appellee argues that the propriety of the present Massachusetts system should not be diluted because of ostensible, rather than actual, enlargements of jurisdiction as originally entrusted to justices of the peace. Appellee asks the Court to recognize that the Massachusetts procedure is not an imaginary scheme, but a functioning and developing process with a three-hundred year history, presently accommodating in excess of one million criminal matters each year. *Seventeenth Annual Report to the Justices*, *op. cit.*, *supra*, note 7, at 52.

II. The Massachusetts Jury Procedure Effects this Court's Enunciation of the Purpose and Function of Jury Trial in America.

In addition to an examination of historical and contemporary practices among the states, the Court, in recent cases touching upon the nature of the jury right, has studied the purpose and function of the jury in contem-

porary society. In *Duncan* v. *Louisiana, supra,* the Court noted:

> * * * Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* [*Palko* v. *Connecticut,* 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts,* 291 U.S. 319 (1934)] took no note of past or current developments regarding jury trials, [and] did not consider its purposes and functions . . . . 391 U.S. at 155.

The Court then stated the purpose (and its components) of the guarantee of jury trial in the Federal and State Constitutions: "a right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." [citing *Singer* v. *United States,* 380 U.S. 24, 31 (1965)] 391 U.S. at 155. The Court continued with categories of potential governmental oppression based upon history and experience:

1. unfounded criminal charges brought to eliminate enemies;
2. judges too responsive to the voice of higher authority;
3. protection against arbitrary action;
4. the corrupt and overzealous prosecutor;
5. the compliant, biased, or eccentric judge;
6. the exercise of plenary powers over the life and liberty of the citizen to one judge or a group of judges;
7. unchecked power; and,
8. arbitrary law enforcement,

concluding, *inter alia,* that: "even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." 391 U.S. at 158.

In *Williams* v. *Florida,* 399 U.S. 78 (1970), the Court considered the question of whether the constitutional guarantee of a trial by "jury" necessarily required trial by exactly twelve persons, rather than some lesser number — in *Williams,* six. 399 U.S. at 86. In deciding the issue the Court stated:

> * * * The relevant inquiry, as we see it, must be the function that the particular feature performs in its relation to the purposes of the jury trial. 399 U.S. at 99-100.

The Court then reviewed the statement of jury purpose contained in *Duncan,* concluding:

> Given this purpose [to prevent oppression by the government], the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. 399 U.S. at 100.

The Court determined that there was little reason to think that these goals are *in any meaningful sense* less likely to be achieved when the jury numbers six, than when it numbers twelve. *Ibid.*

In *Apodaca* v. *Oregon,* 406 U.S. 404 (1972), this Court considered the question of whether conviction of crime by a less-than-unanimous jury violated the right to trial by jury in criminal cases. 406 U.S. at 406. The Court examined relevant constitutional history, noting that conflicting inferences could be drawn therefrom, and stated:

> . . . that in determining what is meant by a jury we must turn to other than purely historical considerations. 406 U.S. at 410.

The Court's inquiry then explicitly focused upon the function served by the jury in contemporary society, and the enunciated jury "purpose" of *Duncan* and *Williams* was examined. The Court concluded that "a requirement of unanimity . . . *does not materially contribute* to the exercise of commonsense judgment." *Ibid.* [Emphasis added.]

In view of the "purpose and function" analyses of *Duncan, Williams,* and *Apodaca,* appellee suggests that it is appropriate in the instant case to examine the Massachusetts jury procedure to determine whether or not the "essential feature" of the jury is effected. The issue is governmental oppression and whether or not the Massachusetts system, in a meaningful sense, prevents such oppression by the interposition of the commonsense judgment of a body of laypersons between the accused and his accuser.[41]

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[41] An examination of the "trial *de novo*" cases decided in the state courts has provided little assistance. In *Manns* v. *Commonwealth*, 213 Va. 233 (1972), the Virginia court made no examination of history, nor analysis of jury purpose, in its consideration of this question. The court seemed merely to reject the argument that *Callan* v. *Wilson* became applicable to the states via *Duncan* v. *Louisiana*, citing to footnote 30 and the dissent of Mr. Justice Fortas. Also, in *State* v. *Halliday*, 109 R.I. 93 (1971), no examination of history or jury purpose is apparent; rather, the Rhode Island court concluded on the basis of *Duncan*, and *Baldwin* v. *New York*, 399 U.S. 66 (1970), that the "mandate of *Callan* is applicable to the states." 109 R.I. at 103.

Cases decided in federal courts bear only indirectly upon potential governmental oppression and, even less directly upon the question of jury purpose. In *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969) (cited with approval by the court in *State* v. *Sparrow*, 276 N.C. 499 (1970)) the Circuit Court examined the "trial *de novo*" procedure in the state of Maine on the basis of a challenge deriving from this Court's determination of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). In its opinion, the Circuit Court made the following statement with respect to the practical nature of the *de novo* procedure:

> . . . [A] defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all. [Footnote omitted.] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity. 414 F.2d at 355.

Although the statement is not explicitly addressed to the issue of governmental oppression, the appellee suggests that the Circuit Court's observation implicitly contraindicates government oppression in the *de novo* process.

In *Manns* v. *Coontz*, 451 F.2d 1344 (4th Cir. 1971), the Circuit Court affirmed a federal district court's refusal to grant relief on the basis of a claim that the Virginia *de novo* procedure was violative of *Duncan.* The basis of dismissal seems to have clearly been 28 U.S.C. §2283 and *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Court did consider the element of irreparable injury and the prosecutorial-oppressive criteria of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), in reaching its decision. Appellee suggests that the Court's action at least implicitly contraindicates governmental oppression in the Virginia procedure.

[42] In *Callan* v. *Wilson*, 127 U.S. 540 (1888), this Court rejected a hypothetical system based upon the ". . . power to provide for several trials, by a court, without a jury, on several successive convictions, before allowing a jury trial." 127 U.S. at 555. Although the record in this case is slight, it is clear that several successive convictions are neither theoretically possible nor actually permissible in the Commonwealth of Massachusetts. The "appeal" and jury trial may

An examination of the Massachusetts jury system discloses that an accused has an absolute right to a body of laymen whose judgment will stand between himself and his accuser after a preliminary adjudication at which he need do nothing.[42] In fact, the defendant obtains the dis-

tinct adavantage of being able to discover the prosecution's case without having to disclose his own, while in no way jeopardizing his right to trial by jury. Although he cannot as of right *waive* a trial at the district court level, *cf., Lemieux* v. *Robbins, supra,* at 355, n. 4, he can certainly *avoid* a trial by merely listening to the Commonwealth's evidence without offering his own and, if found guilty, appealing, which is what appellant Costarelli did in this case. Brief for the Appellant, p. 9. On appeal, the district or municipal court proceeding becomes a nullity: the appeal "wipes out the lower court action entirely." *Mann* v. *Commonwealth,* 359 Mass. at 666.

Admittedly, the *de novo* procedure effects a minimal degree of restriction and, arguably, inconvenience.[43] We see, however, the question as one of oppression, and not of inconvenience: can it be said that the *de novo* procedure materially dilutes the function of a jury when the defendant may listen to the government's case, without disclosing his own, and have, immediately thereafter and of absolute right, the further community participation in the process of adjudication of guilt or innocence and the interposition of commonsense judgment of a group of laymen — and, at the same time have the possibility of immediate acquittal? We suggest that the answer should be in the negative. The function of the jury is preserved.

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be elected immediately by a convicted district court defendant and, as such, should be distinguished from the *possibility* of prolonged litigation which was suggested by this Court in *Callan.*

[43] The Commonwealth justifies the inconvenience by pointing out that the district courts are designed, in the interest of both the defendant and the Commonwealth, to provide speedier and less costly adjudications than are possible on the second level of the Massachusetts two-tier system. The *de novo* system alleviates the burden in the Superior Court, where the full range of constitutional guarantees is available to all on appeal. *Cf., Colten* v. *Kentucky,* 407 U.S. 104, 114 (1972).

III. This Case Does Not Require Consideration of the Right to a Speedy Trial.

The Court's opinion in *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. And the Court, in *Barker* v. *Wingo,* 407 U.S. 514 (1972), undertook to "identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." 407 U.S. at 530.

In the instant case the appellant has asserted that the interposition of a trial by magistrate prior to affording the accused a trial by jury is an unconstitutional imposition on the right to a speedy trial. Brief for the Appellant, p. 41. The appellee suggests, however, that if this Court determines that the concept of "jury" contemplates first-instance-every-instance jury trial, then a consideration of the appellant's speedy trial claim becomes unnecessary.

Alternatively, should the Court agree that the Massachusetts criminal jury procedure complies with the *Duncan* requirement, then it is suggested that the appellant's claim is without substance, as, among other things, the record in this fails to disclose any measurable period of time which can be assessed against the *Barker* v. *Wingo* factors. Indeed, the appellant acknowledges that the time delay in appeal to the misdemeanor session in the County of Suffolk is "short". Brief for the Appellant, p. 42, n. 44. We assume this to be an acknowledgment that it is the *de novo* aspect of the Massachusetts procedure to which the appellant primarily objects. Assuming, then, the propriety of that procedure, it is suggested that a "short" delay is inadequate as a claim of violation of the right to a speedy trial.

IV. The Massachusetts Criminal Jury Procedure Complies With The Fourteenth Amendment's Ban Against "Double Jeopardy".

The Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 781 (1968). This is, appellee acknowledges, a fundamental guarantee. *Id.* at 795. However, as the Court noted in *North Carolina* v. *Pearce,* 395 U.S. 711, 719-721:

> At least since 1896, when *United States* v. *Ball,* 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. "The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo,* 377 U.S. 463, 465. [Footnote omitted.]

And further:

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.

This rationale was applied to a two-tier system of criminal justice in *Colten* v. *Kentucky,* 407 U.S. 104 (1972). There the appellant had been convicted of a misdemeanor in the Kentucky two-tier system. On appeal to this Court, the appellant challenged, *inter alia,* the constitutionality

of the enhanced penalty he received after conviction at his "second-tier" trial. As to the appellant's double jeopardy argument this Court said:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S., at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in *Pearce,* where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. 407 U.S. at 119-20.

Appellee suggests that in determining that the imposition of a more severe penalty upon reconviction in Kentucky's two-tier system was constitutionally permissible, this Court held, *a fortiori,* that retrial and reconviction in the Kentucky two-tier system were constitutionally permissible.

In Massachusetts, as was the case in Kentucky, the defendant in a criminal trial "appeals" to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky,* 406 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second-tier is absolute and, at the defendant's behest the lower court proceedings are "wiped out entirely." *Mann* v. *Commonwealth,* 359 Mass. at 666. See *Colten* v. *Kentucky,* 406 U.S. at 113 n. 3.

Thus, appellee suggests, the Massachusetts *de novo* trial procedure does not violate the double jeopardy ban of the Fourteenth Amendment.

VIII. Conclusion

Upon the basis of the foregoing, the appellee suggests that the Court should dismiss this appeal because the Court is without jurisdiction, in that the judgment herein appealed is not a final judgment rendered by the highest court of Massachusetts in which a decision could be had.

Alternatively, the appellee suggests that the appeal should not be treated as a case upon petition for writ of certiorari; however, if so treated, that certiorari be denied.

Alternatively, if determination be made upon the merits, appellee suggests that this Court conclude that the appellant's claim is without merit in that he was afforded, under Massachusetts procedure, a jury trial within the requirements of the Fourteenth Amendment.

Respectfully,[44]

FRANCIS X. BELLOTTI
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Bureau
DAVID A. MILLS
Assistant Attorney General
Chief, Criminal Appellate Section
131 Tremont Street
Boston, Massachusetts 02111
Attorneys for the Appellee

[44] Counsel acknowledge, with gratitude, that John S. Legasey of the Northeastern University School of Law and Vernon C Watters of the Harvard Law School have assisted the Commonwealth greatly in the preparation of this brief.

APPENDIX A

The Criminal Jurisdiction of the Massachusetts Courts

1. The "District Courts" of Massachusetts are created by a statute which geographically divides the Commonwealth into seventy-three districts. Mass. Gen. Laws, ch. 218, §1. Each of these seventy-three courts is a court of record and "of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction. . . ." Mass. Gen. Laws, ch. 218, §4. The criminal jurisdiction of the District Courts is defined as follows:

> District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Mass. Gen. Laws, ch. 218, §26.*

* There is some justification for the suggestion that the Boston Municipal Court and the Massachusetts District Courts are separate and distinct courts, each of its own "system." For example, the District Courts were established by statute in 1893, and the Boston Municipal Court was established by statute in 1821. See, Seventeenth Annual Report to the Justices of the Supreme Judicial Court, pp. 3-4 (1973). However, under current Massachusetts law, Gen. Laws,

2. The "Superior Court" of Massachusetts is not a court of geographical definition, but rather of composition (Mass. Gen. Laws, ch. 212, §§1-6). The Superior Court was established by statute in 1859. The criminal jurisdiction of the Superior Court is defined as follows:

> The court shall have original jurisdiction of all crimes and appellate jurisdiction of crimes tried before a district court. Crimes committed in that part of Scituate described in chapter three hundred and ninety-four of the acts of nineteen hundred and twelve shall be within the territorial jurisdiction of the court both in Norfolk county and in Plymouth county, and arrests and service of process in such cases may be made by an officer qualified to serve criminal process in Cohasset. Crimes committed in any part of Cambridge, Watertown or Newton lying in the Charles river basin shall be within the territorial jurisdiction of the court both in Middlesex county and in Suffolk county. As amended St. 1953, c. 319, § 24. Mass. Gen. Laws, ch. 212, §6.

3. The intermediate appellate court, known as the Massachusetts Appeals Court, was created in 1972 by Chapter 740 of the Acts of 1972, Mass. Gen. Laws, ch. 211A. That court, subject to such further appellate review by the Supreme Judicial Court as may be permitted pursuant to Massachusetts law (Mass. Gen. Laws, ch. 211A, §11, or otherwise), has concurrent appellate jurisdiction with the Supreme Judicial Court, to the extent review is otherwise

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ch. 218, §1, the Boston Municipal Court is considered to be one of the District Courts of Massachusetts and, accordingly, appellee suggests that for the purposes of this brief, and indeed, this appeal, the Boston Municipal Court should be considered as the equivalent of a Massachusetts District Court unless a contrary position is explicitly noted because of some explicit and controlling distinction made in Massachusetts statutes or applicable case law. See, Brief for Appellant, p. 2, n. 1.

allowable, with respect to a determination made in the Superior Court (and others) in criminal cases, irrespective of whether sentence has been imposed, except in review of convictions for first degree murder or where a sentence of death or life imprisonment has been imposed. Mass. Gen. Laws, ch. 211A, §10. This jurisdiction is subject, however, to this *proviso:* that whenever two justices of the Supreme Judicial Court issue an order for direct review by the Supreme Judicial Court in any case on appeal, either at the request of one of the parties or at the court's own initiative, upon finding that the questions to be decided are:

> * * * (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; . . .,

the case will be reviewed directly by the Supreme Judicial Court without the necessity of any prior hearing or decision by the Appeals Court on the merits of the issues sought to be reviewed.

4. The Supreme Judicial Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein." Mass. Gen. Laws, ch. 211, §3. And, Massachusetts statute expressly provides that "questions of law arising upon exceptions, report or appeal shall be heard and determined by the full court." Mass. Gen. Laws, ch. 211, §5.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment of the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Constitution of Massachusetts:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Title 28, United States Code, Section 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Massachusetts General Laws Chapter 218, Section 27A:

[Trial by jury of six in certain courts]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which

the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the

superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has any may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other

disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

Massachusetts General Laws, Chapter 278, Section 18:

[Appeals in criminal cases [illegible]uperior courts; recognizance]

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six,

until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk county or in municipal court of Boston]

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to

the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

Supreme Court, U. S.
FILED
MAR 14 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-6739.

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON.

Motion for Leave to File Brief Amicus Curiae.

GERARD F. SCHAEFER,
Chief Counsel,
MALVINE NATHANSON,
Chief, Appeals Division,
MARGARET D. McGAUGHEY,
MASSACHUSETTS DEFENDERS COMMITTEE,
120 Boylston Street,
Boston, Massachusetts 02116.

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1974.

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COMMONWEALTH OF MASSACHUSETTS,
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ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON.

Motion for Leave to File Brief Amicus Curiae.

The Massachusetts Defenders Committee hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for appellant and appellee have been obtained and are attached hereto.

The interest of the Massachusetts Defenders Committee arises from the fact that the Massachusetts Defenders Committee is the state-wide public defender agency for the Commonwealth of Massachusetts and as such represents numerous indigents charged with crime in the District Courts of the Commonwealth of Massachusetts. The resolution of the issues in this case, which calls into question the constitutionality of the trial de novo system, may substantially affect the procedural and substantive rights of our clients. In addition, the Massachusetts Defenders Committee is in a position to provide this Court with information concerning the operation of the trial de novo system and its effect on indigent defendants.

The Massachusetts Defenders Committee recognizes that this application is untimely under the rules of this Court. However, in view of the substantial involvement of the Massachusetts Defenders Committee in the representation of defendants in the District Courts, it is hoped that this Court will consider this motion favorably.

Respectfully submitted,

MALVINE NATHANSON,

MASSACHUSETTS DEFENDERS COMMITTEE,

120 Boylston Street,

Boston, Massachusetts 02116.

Massachusetts Defenders Committee

Appeals Division

120 Boylston Street, Room 600, Boston 02116

TELEPHONE:
(617) 482-6212

February 27, 1975

David A. Mills, Esq.
Assistant Attorney General
131 Tremont Street
Boston, Massachusetts 02111

RE: Steven Costarelli v. Commonwealth of Massachusetts
Supreme Court No. 73-6739; October Term, 1974

Dear Mr. Mills:

Pursuant to our earlier conversation, I would appreciate it if you would indicate your consent to the filing of an amicus brief in the above-entitled case by signing your name on the line below and returning this letter to me.

Very truly yours,

Malvine Nathanson

(Ms.) Malvine Nathanson
Chief Appellate Attorney

MN:mjc

I hereby give my consent for the Massachusetts Defenders Committee to file an amicus curiae brief in the above-entitled case.

David A. Mills, Esq.

BEST COPY AVAILABLE

Massachusetts Defenders Committee

Appeals Division

120 Boylston Street, Room 600, Boston 02116

TELEPHONE:
(617) 482-6212

February 27, 1975

Robert Hagopian, Esq.
Wrentham
Massachusetts 02093

RE: Steven Costarelli v. Commonwealth of Massachusetts
Supreme Court No. 73-6739; October Term, 1974

Dear Mr. Hagopian:

Pursuant to our earlier conversation, I would appreciate it if you would indicate your consent to the filing of an amicus brief in the above-entitled case by signing your name on the line below and returning this letter to me.

Very truly yours,

Malvine Nathanson

(Ms.) Malvine Nathanson
Chief Appellate Attorney

MN:mjc

I hereby give my consent for the Massachusetts Defenders Committee to file an amicus curiae brief in the above-entitled case.

Robert Hagopian, Esq.

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MALVINE NATHANSON,
Chief, Appeals Division,
MARGARET D. McGAUGHEY,
MASSACHUSETTS DEFENDERS COMMITTEE,
120 Boylston Street,
Boston, Massachusetts 02116.

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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Brief of Amicus Curiae
Massachusetts Defenders Committee.

Interest of Amicus.

The Massachusetts Defenders Committee is the state-wide public defender agency for the Commonwealth of Massachusetts. As such, it has the responsibility of providing representation for indigents charged with crime in the Commonwealth.

The Massachusetts Defenders Committee appears in the District Courts in thirteen of the fourteen counties of the Commonwealth. During the year 1974, the Massachusetts Defenders Committee represented 30 per cent of the indigent defendants charged with crimes over which the District Courts had jurisdiction.

Costarelli v. *Commonwealth* deals with the rights of defendants charged with crime in the District Courts. The Massachusetts Defenders Committee, because of its extensive representation of such defendants, has a proper and legitimate concern with the resolution of the issues raised in *Costarelli*. Letters of the consent of both parties to the submission of this brief have been filed with the office of the Clerk of the Supreme Court of the United States.

Argument.

This brief is submitted to provide the Court with the factual background of the trial de novo system as it operates in the Commonwealth of Massachusetts. Its purpose is to enable the Court to assess the practical impact its decision would have, not only on the parties to the suit before the Court, but on the administration of justice in the Commonwealth of Massachusetts.

A. Factual Statement of the Operation of the Trial De Novo System in Massachusetts.

The judicial system of the Commonwealth of Massachusetts is composed of a two-tier trial court structure. The lower

tribunal is the District Court,[1] which sits part or fulltime in seventy-two locations throughout the state (G.L. c. 218, § 1). The higher tribunal is the Superior Court, which operates in each of the Commonwealth's fourteen counties.

A criminal case may be initiated in this two-tier system in either of two ways. The first manner of proceeding is by means of indictment by grand jury (G.L. c. 263, § 4). Following indictment, a case is heard with or without a jury in the Superior Court (G.L. c. 278, § 2). As a matter of practice, indictment by grand jury is employed only where a major felony, such as murder, is involved, cases comprising less than one per cent of charges brought in the Commonwealth.[2]

The second means of proceeding in a criminal case is by filing a complaint in the lower tribunal, the District Court. G.L. c. 218, § 26, provides that the District Courts shall have original jurisdiction, concurrent with the Superior Court, of all misdemeanors (excepting libels), all felonies punishable by imprisonment in the state's prison for a term not exceeding five years, and certain specifically enumerated crimes.[3] Approximately 99 per cent of criminal cases are initiated in the District Court.

In most cases where the charge carries a maximum sentence in excess of five years, the District Court is without jurisdiction

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[1] The District Courts include the Municipal Court of the City of Boston. G.L. c. 218, § 1.

[2] Estimates of the distribution of cases initiated by grand jury indictment as opposed to complaint in the District Court are derived from statistics compiled by the Massachusetts Defenders Committee concerning defendants represented by the Committee.

[3] The specifically enumerated charges, all of which would otherwise be exempted from the original jurisdiction of the District Court because the maximum penalty exceeds five years, include breaking and entering in the nighttime (G.L. c. 266, § 16), breaking and entering in the daytime (G.L. c. 266, § 17), and entering a dwellinghouse (G.L. c. 266, § 18).

to try the merits (G.L. c. 218, § 26). In such instances, a hearing is held in the District Court to determine whether probable cause exists to bind the accused over to the Superior Court for trial (G.L. c. 218, § 30). In cases begun in the District Court over which the District Court has concurrent jurisdiction with the Superior Court, disposition may be made in any of four ways.

First, the accused may plead guilty to the charges and be sentenced by the District Court. Second, an accused may admit to sufficient facts to support a finding of guilty and submit to a finding of guilty and the imposition of sentence by the District Court. By admitting to sufficient facts, an accused essentially pleads nolo contendere before the District Court. A third means of disposition is for the District Court to decline to exercise its jurisdiction and hold a hearing to determine whether probable cause exists to hold the accused for trial in the Superior Court (G.L. c. 218, § 30). In such a case, the individual will be indicted by grand jury pursuant to G.L. c. 263, § 4, and the case will be treated as if begun in the Superior Court in the first instance.

The fourth option for disposition is a trial on the merits before the District Court sitting without a jury. The full panoply of due process rights afforded in trials by the Superior Court sitting without a jury obtain at the District Court trial except that no stenographic recording is required.[4] Counsel is appointed to defend the accused (G.L. c. 263, § 5); compulsory process of witnesses issues (G.L. c. 218, § 37; G.L. c. 263, § 5); the accused is permitted to confront his accusers (G.L. c. 263, § 5).

[4] While no stenographic transcription of District Court proceedings is required by law, as a matter of practice, multi-track tape recordings are employed in some sessions of the District Court. Rule 46 of the Rules of the District Court. An accused who is able to pay for stenographic recording of the District Court proceedings may have a stenographer present (G.L. c. 218, § 27A).

As a matter of practice, final disposition of a case in the District Court occurs not longer than two weeks after the filing of the complaint. G.L. c. 276, § 35, provides that no continuance for a period exceeding ten days may be granted without the consent of the accused.

A defendant who has pleaded guilty before the District Court has no right to appeal the merits of his case. *Commonwealth* v. *Crapo*, 212 Mass. 209 (1912); Kent B. Smith, *Criminal Practice and Procedure*, Massachusetts Practice Series, vol. 30, § 754. Review of the sentence imposed may be obtained, however, by filing a claim of appeal before the Superior Court sitting as the Appellate Division (G.L. c. 278, § 28B). Consequently, few, if any, defendants plead guilty before the District Court.

An accused who admits to facts sufficient to support a finding of guilty essentially pleads guilty before the District Court, but does not waive his right to trial de novo before the Superior Court. Similarly, a defendant who has been tried before the District Court is afforded a trial de novo in the Superior Court on both the question of guilt and the sentence received (G.L. c. 278, § 18). Appeal is taken from District Court findings in approximately 3 per cent of criminal cases initiated in that tribunal.[5]

Where an appeal is claimed either from the finding of guilt of the District Court or the sentence imposed by that tribunal, a trial de novo may be heard in any of three tribunals. In cases where a misdemeanor is charged, the accused may elect a trial de novo before a session of the District Court sitting

[5] Statistics compiled by The Honorable Franklin Flaschner, Chief Justice of the District Courts of Massachusetts, for the year ending June 30, 1974 (Appendix A), indicate that 533,661 complaints for charges other than parking violations were filed in the District Court during that period. Of those, appeals were taken in 14,999 cases.

with a jury of six members (G.L. c. 218, § 27A; G.L. c. 278, § 18). A defendant convicted of a misdemeanor by a District Court in Suffolk County (including the city of Boston) may claim a trial de novo before a jury of twelve presided over by a justice of the District Court sitting as a justice of the Superior Court (G.L. c. 278, § 18A). In any case where a felony has been charged, de novo trial may be claimed to a felony session of the Superior Court (G.L. c. 278, § 18). There, the defendant may plead guilty or be tried by the Superior Court sitting with or without a jury.

Where a sentence of less than six months imprisonment has been imposed by the District Court, appeal must be claimed at the time the sentence is awarded (Smith, *supra*, at § 743). Where a term of more than six months has been imposed, a claim of appeal must be filed within 24 hours of sentencing by the District Court (G.L. c. 218, § 31). In any case, G.L. c. 278, § 18, requires that the appealed case be entered in the Superior Court on the next return date after the appeal is taken, usually the Monday following imposition of sentence. A claim of appeal may be withdrawn at any time before action is taken by the Superior Court (G.L. c. 278, § 25), and as a matter of practice may be withdrawn by permission of the court at any time before a jury is empanelled.

If the appeal is pursued, however, the case is treated as if begun in the Superior Court in the first instance, except that neither indictment by the grand jury nor arraignment before the Superior Court is required. The sentence imposed by the District Court does not take effect (G.L. c. 278, § 18).

B. The Right to Trial by Jury in the First Instance is Not Inconsistent with the Trial De Novo System as it Operates in the Commonwealth of Massachusetts.

Amicus agrees with the appellant in this case that the right to trial by jury in the first instance is secured by the Sixth and

Fourteenth Amendments to the Constitution of the United States. *Duncan* v. *Louisiana*, 391 U.S. 145, 147 (1968); *Callan* v. *Wilson*, 127 U.S. 540 (1888). However, amicus is concerned lest this Court be persuaded that enforcement of the right necessitates the abolition of the trial de novo system as it operates in the Commonwealth of Massachusetts, or conclude that the trial de novo system is constitutionally objectionable. Amicus urges that the right to trial by jury in the first instance can be recognized within the existing structure and will seldom be exercised by defendants because in the vast majority of cases the trial de novo system operates to the advantage of criminal defendants.

Appellant's brief contends that the threat of increased sentence after appeal from the District Court to the Superior Court chills the exercise of the Sixth Amendment right to trial by jury, which right is provided only in the Superior Court (Appellant's brief, pp. 25-38). The experience of the Massachusetts Defenders Committee has been that the sentence imposed by the District Court is seldom, if ever, raised after appeal to the Superior Court. In fact, sentences given by the District Court are frequently lowered by the Superior Court. Moreover, of sentences imposed by the District Court, substantially less than 20 per cent result in commitment (Appendix B). Only 9 percent of the Committee's clients elect to appeal their cases (Appendix B).[6]

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[6] In any event, a defendant claiming an appeal to the Superior Court who is threatened with an increased sentence may withdraw his appeal at any time (G.L. c. 278, § 25). Thus, an accused is not penalized by asserting his right to trial de novo in the Superior Court. Rather, he not only knows the outer limits of his liability before claiming an appeal, but in fact may expect a reasonable likelihood that his sentence will be reduced by the Superior Court. The de novo system, therefore, instead of increasing the "anxiety and concern of the accused," in actuality reduces it. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972).

A second contention advanced by the appellant is that interposing a trial by the District Court between the filing of a complaint and a trial by jury in the Superior Court deprives a criminal defendant of his Sixth Amendment right to speedy trial (Appellant's Brief, pp. 41-45). As has been pointed out above, the Massachusetts statute provides that no continuance may be granted in the District Court for a period exceeding ten days unless the consent of the accused is obtained (G.L. c. 276, § 35). Absent delay at the behest of the defendant, District Court proceedings usually begin within ten days after the filing of the complaint. As a matter of practice, the proceedings in the lower court are ordinarily terminated after one day of hearing. Thus, the longest delay an accused claiming trial usually suffers in the District Court is a period of ten days to two weeks. Further, as a matter of practice, a defendant whose case is initiated in the District Court may actually appear before a jury in the Superior Court faster than a defendant whose case is begun by indictment by grand jury.[7]

[7] A defendant who wants an immediate trial by jury may admit to the facts before the District Court and submit to a finding of guilty and imposition of sentence by that court the first time he appears. By statute, the case is then entered in the Superior Court on the return date following the day sentence is imposed (G.L. c. 278, § 18). When the case is entered in the Superior Court, no indictment by grand jury or arraignment before the Superior Court is required.

By contrast, a defendant whose case is begun by indictment by grand jury often must wait months before the charges are brought for trial before a jury. In many of the major urban areas of Massachusetts, where a grand jury sits monthly, an indictment may be obtained in a month's time. In the outlying counties, however, a defendant may have to wait for a period of three to six months for a grand jury to convene. Once an indictment is procured, a defendant must still be arraigned in the Superior Court and his case must be set down for pretrial conference before trial may commence. Thus, whereas an indicted accused may suffer a delay in excess of six months before being brought before a jury, a defendant whose case is begun in the District Court may stand ready for trial before a jury within weeks of the filing of the complaint.

Moreover, should this Court declare the existing trial de novo system unconstitutional, the existing delays in bringing criminal cases to trial would not be eliminated. On the contrary, forcing all cases to trial before the already overburdened Superior Courts of Massachusetts would merely exacerbate existing delays.

A third contention advanced by appellant is that the trial de novo system imposes an intolerable burden on the right to trial by jury because of the expense involved in defending two proceedings (Appellant's Brief, pp. 25-29). Appellant points to the financial consequences of paying witness and counsel fees as well as bail bondsman premiums.

With regard to witness and counsel fees, such expenses are incurred for at most one to two days when proceedings are initiated in the District Court. Where the District Court proceedings result in a finding of not guilty, of course no additional fees are required. Moreover, in the experience of the Massachusetts Defenders Committee, a case which is first tried in the District Court requires substantially less preparation time than a case initiated by indictment because the government's basic contentions have been exposed at the District Court hearing. Thus, the District Court system, rather than increasing attorney costs, in fact reduces them.

With regard to bail bondsman premiums, that expense is incurred only once, whether the case is initiated by grand jury indictment or by a complaint in the District Court (G.L. c. 278, § 18). Under no circumstances is bail forfeited merely because an appeal is taken to the Superior Court.

Thus, some of the burdens alleged to be imposed on the exercise of the right to trial by jury by the de novo system do not exist or are not as severe as is asserted in appellant's brief. Further, in the opinion of the Massachusetts Defenders Committee, substantial advantages inure to most defendants whose cases are initiated by complaint in the District Court.

The first benefit an accused obtains by virtue of the de novo system is a speedy initial determination of innocence or guilt. Within two weeks a case may be terminated altogether.

A second substantial advantage resulting from the trial de novo system is that an accused has two opportunities to be found not guilty. If a defendant loses his case in the District Court, an entirely new proceeding may be commenced in the Superior Court, at which the defendant resumes his constitutional presumption of innocence and defends his case again.

A third benefit reaped from the de novo procedure is that the District Court proceedings provide a defendant with virtually complete discovery of the Commonwealth's case.[8] At the District Court level, a defendant may file all discovery motions permitted in the Superior Court (G.L. c. 263, § 5). The defense may therefore both expose the witnesses for the government and solidify their testimony for impeachment purposes at a later Superior Court trial.

Not only does the defendant incur advantages by the trial de novo system, but the Commonwealth is benefited as well. The Commonwealth, like defendants, has an interest in the quick and efficient determination of criminal cases. Ninety-seven per cent of cases initiated in the District Court are resolved in that tribunal, at a substantially reduced cost (Appendix A).

There are cases where, because of the stigma flowing from a finding of guilty in the District Court or because of adverse consequences resulting automatically from a conviction in the District Court, a defendant may wish to avail himself of his

[8] Unlike the federal criminal justice system, Massachusetts has no counterpart of the "Jencks Act," 18 U.S.C.A. § 3500. Moreover, only recently were Massachusetts defendants awarded the right to inspect the minutes of grand jury proceedings. *Commonwealth* v. *Dominico*, Mass. App. Ct. Adv. Sh. (1974) 49.

right to trial by jury in the first instance.[9] It is the position of amicus that a defendant who wishes to exercise that right should be permitted to do so. *Callan* v. *Wilson*, *supra*, 127 U.S. 540 (1888); *Duncan* v. *Louisiana*, *supra*, 391 U.S. 145 (1968).

What the parties to this case have not made clear, however, is that affording a trial by jury in the first instance does not necessitate abolition of the trial de novo system. Rather, granting the right would mean only that in a case where the defendant moves for a trial by jury in the first instance, the District Court judge would be required to exercise the option provided by the Massachusetts statute to hold a probable cause hearing instead of a trial and, if probable cause is found, bind the defendant over to the grand jury. See *Myers* v. *Commonwealth*, Mass. Adv. Sh. (1973) 1045; *Corey* v. *Commonwealth*, Mass. Adv. Sh. (1973) 1237.

It is the position of amicus that this Court should hold in favor of the appellant and recognize the right to trial by jury in the first instance. However, amicus urges the Court to do so in a manner consistent with the Massachusetts trial de novo system.

[9] For example, G.L. c. 90, § 24, under which appellant in this case was convicted, provides that upon a finding of guilty of any of the charges enumerated in that section, the registrar of motor vehicles shall revoke the licence of the accused immediately, and no appeal shall operate to stay the revocation of the license. Under § 24, therefore, immediate and automatic injury results from a finding of guilt in the District Court, made without a trial by jury. Unlike all other criminal cases before that tribunal, execution of the penalty is not stayed pending appeal to the Superior Court. See also G.L. c. 90, §§ 20, 22A, 22F; G.L. c. 266, § 28. Cases charged under G.L. c. 90, § 24, however, comprise less than 6 per cent of criminal complaints brought in the District Court (Appendix A).

Conclusion.

For the above-stated reasons, amicus curiae, the Massachusetts Defenders Committee, concludes that the conviction below should be reversed.

Respectfully submitted,

GERARD F. SCHAEFER,
Chief Counsel,
MALVINE NATHANSON,
Chief, Appeals Division,
MARGARET D. McGAUGHEY,
MASSACHUSETTS DEFENDERS COMMITTEE,
120 Boylston Street,
Boston, Massachusetts 02116.
Counsel for Amicus Curiae.

Appendix A.

STATISTICS FOR THE DISTRICT COURTS OF MASSACHUSETTS FOR THE YEAR ENDING JUNE 30, 1974, AS REPORTED BY THE CLERKS OF SAID COURTS

Compiled by the office of the Chief Justice of the District Courts

	DISTRICT COURTS arranged in accordance with 1970 CENSUS	1 Total Civil Writs Entered	2 Trials Less Summary Process	3 Summary Process Entered (Included in Column 1)	4 Summary Process Tried	5 Removals to Superior Court	6 Reported to Appellate Division	7 Reported to Supreme Judicial Court	8 Supplementary Process Entered	9 Small Claims Entered	10 Total Criminal Complaints (except Parking Complaints)	11 Narcotics Harmful Drugs, etc.	12 Gaming and/or Lottery Cases	13 Operating Under Influence of Intoxicating Liquor	14 Operating Under Influence of Drugs	15 Operating so as to Endanger	16 Using Without Authority and Larceny of Motor Vehicle	17 All Other Motor Vehicle Complaints (except Parking)	18† All Other Criminal Complaints	19 Criminal Parking Complaints	20 Criminal Appeals	21 Juvenile Drug Complaints	22 All Other Juvenile Complaints	23 Neglected Children	24 Parking Tickets Returned	25 Commitments of Mentally Ill	26 Neglect of Family Non-Support: Number of New Cases	27 Neglect of Family Non-Support: Amount of Money Collected	28 Uniform Reciprocal Enforcement of Support Act G.L.C. 273A: Cases Initiated	29 Uniform Reciprocal Enforcement of Support Act G.L.C. 273A: Cases Received from Other States	30 Uniform Reciprocal Enforcement of Support Act G.L.C. 273A: Amount of Money Collected	31 Remand or Transfer Cases Acts 1958, C. 359: Cases Received	32 Remand or Transfer Cases Acts 1958, C. 359: Tried	33 Remand or Transfer Cases Acts 1958, C. 359: Retransferred to Superior Court after Trial	34 Remand or Transfer Cases Acts 1958, C. 359: Dispositions, Agreements, Trials, Defaults, Appeals, Dismissals, Settlements, etc.	35 Remand or Transfer Cases Acts 1958, C. 359: Pending	
1	Central Worcester	4,380	238	837	139	120	3	2	1,658	3,469	36,595	703	47	423	2	184	195	25,974	9,067	24,579	989	-	-	-	118,362	66	43	53,151.74	32	48	155,084.68	1,035	135	57	897	2,240	1
2	Springfield	3,635	1,104	624	82	194	5	0	2,384	5,733	31,239	882	132	581	8	356	202	22,489	6,589	93,490	715	-	-	-	43,281	271	151	165,200.69	34	111	250,640.77	169	70	39	352	266	2
3	East Norfolk, Quincy	3,881	517	343	117	206	1	0	1,143	3,032	20,348	481	11	657	10	408	118	15,865	2,798	1,072	406	92	1,488	3	49,424	73	66	64,078.50	53	36	158,341.28	306	43	16	341	458	3
4	1st Eastern Middlesex, Malden	3,211	328	345	263	234	0	0	1,140	2,711	12,642	388	11	339	19	186	218	9,209	2,272	24,163	330	60	1,269	3	86,419	28	38	167,930.03	10	26	121,463.69	285	277	20	341	257	4
5	Lowell	2,573	166	705	195	116	2	1	867	7,483	14,250	348	60	361	7	196	171	6,459	6,648	3,995	493	39	1,476	76	15,414	140	236	566,348.49	39	17	171,699.50	295	97	19	406	364	5
6	3rd East, Middlesex, Cambridge	3,121	258	384	83	153	11	2	823	2,273	13,101	257	23	174	4	155	242	9,539	2,707	51,074	494	21	1,055	10	283,513	104	57	83,439.03	29	28	139,910.26	162	85	66	282	290	6
7	Dorchester	2,617	414	1,344	247	88	4	0	2,023	1,972	9,789	421	222	265	3	328	188	4,507	3,855	45,198	78	36	1,356	18	22,424	23	138	443,016.88	40	59	112,905.63	208	455	96	812	180	7
8	Southern Essex, Lynn	1,634	235	403	159	49	0	0	686	2,190	10,926	264	14	377	13	224	108	7,826	2,100	1,357	326	36	894	8	7,524	65	36	147,434.80	29	24	140,320.32	261	45	26	278	41	8
9	4th East, Middlesex, Woburn	1,715	278	138	48	156	4	0	654	2,054	11,483	332	51	306	7	202	45	7,522	3,018	15,108	505	58	863	10	58,453	2	95	96,290.85	22	18	96,234.92	252	92	10	298	108	9
10	Third Bristol, New Bedford	2,072	223	364	152	141	1	0	2,184	4,844	12,410	564	195	274	5	209	159	5,909	5,115	8,798	373	-	-	-	7,524	65	36	147,434.80	29	24	140,320.32	261	45	26	278	41	9
11	Northern Norfolk, Dedham	1,349	116	120	19	105	3	0	862	1,281	8,416	120	3	170	1	79	84	6,532	1,207	3,415	400	43	678	0	15,554	72	12	27,852.01	30	15	100,640.26	111	46	42	157	65	11
12	Lawrence	1,607	295	354	94	118	1	0	410	1,304	8,703	280	39	171	14	105	107	4,622	2,964	3,742	398	27	714	37	25,947	79	95	96,513.66	23	25	83,679.67	191	27	7	209	81	12
13	Second Bristol, Fall River	1,322	84	189	62	79	3	0	356	1,454	9,940	314	11	157	12	134	71	3,976	2,965	9,810	87	-	-	-	58,915	29	18	30,330.76	14	10	83,488.14	187	30	12	184	128	13
14	West Roxbury	1,049	160	451	120	51	0	0	1,005	1,690	10,726	384	98	393	15	519	497	5,925	2,895	7,704	151	42	862	11	15,730	95	37	99,588.87	58	44	103,048.94	82	43	8	132	128	14
15	First Essex, Salem	1,491	230	244	205	75	0	0	446	1,429	9,333	156	5	226	7	208	36	6,465	2,210	2,567	55	28	652	8	30,775	53	24	164,921.69	14	10	83,488.14	187	30	12	184	128	14
16	1st So. Middlesex, Framingham	1,565	45	248	22	136	3	0	890	1,836	14,970	422	22	425	1	282	58	11,098	2,662	1,558	480	32	555	5	81,325	146	5	51,780.90	30	20	74,682.06	57	13	8	32	11	15
17	Brockton	2,042	263	590	255	202	4	0	825	2,222	11,764	523	4	577	17	363	133	5,878	4,269	5,291	243	78	1,231	34	19,191	400	43	334,583.67	21	23	111,420.61	156	16	6	175	319	16
18	Hampshire, Northampton	557	58	102	45	36	2	0	113	1,438	10,945	551	0	382	7	335	104	7,842	1,724	2,241	480	32	555	5	81,325	146	5	51,780.90	30	20	74,682.06	57	13	8	32	11	17
19	2nd Plymouth, Hingham	988	210	110	37	39	2	0	673	1,354	9,747	235	0	403	11	360	77	6,439	2,216	1,894	573	42	1,011	2	2,710	41	40	210,805.51	40	20	102,491.86	50	22	4	26	72	18
20	2nd East, Middlesex, Waltham	2,348	224	142	74	121	2	0	489	1,514	13,595	439	13	293	22	227	70	11,369	1,216	11,537	220	23	581	4	51,238	92	14	31,951.04	9	14	49,799.80	200	68	33	161	176	19
21	Central Middlesex, Concord	767	86	66	33	53	0	0	285	942	16,307	347	0	329	7	152	69	13,769	1,434	3,266	530	63	855	4	11,890	14	43	65,681.15	13	22	79,739.07	90	27	13	94	0	20
22	Roxbury	1,843	80	1,263	310	65	2	1	1,222	1,321	14,240	559	117	315	9	273	315	8,088	4,364	93,359	241	-	-	-	314,853	37	247	239,782.40	54	62	213,076.80	92	35	1	94	80	21
23	Newton	1,210	197	57	26	121	2	0	391	1,097	5,572	98	0	57	7	40	51	4,056	1,263	2,596	150	7	391	2	58,703	11	10	20,751.00	8	9	47,941.11	162	49	30	239	79	22
24	Western Norfolk, Wrentham	636	92	89	22	34	0	0	347	1,689	9,584	209	2	228	0	322	58	6,785	1,980	42	175	32	931	3	1,271	61	25	102,765.16	26	35	55,328.32	83	44	11	120	61	23
25	Somerville	1,012	157	194	118	92	4	0	574	1,308	3,940	248	39	44	2	38	94	5,060	1,415	12,489	137	25	321	0	64,306	8	8	86,137.00	53	63	36,514.33	205	58	15	282	159	24
26	First Bristol, Taunton	823	18	150	45	34	0	0	225	1,748	6,294	218	5	232	4	425	139	3,534	1,667	1,417	417	-	-	-	6,629	54	73	100,473.00	26	25	63,008.29	54	14	6	55	44	25
27	Central Berkshire, Pittsfield	699	41	162	114	46	0	0	134	1,069	5,307	123	9	165	2	209	11	3,124	1,664	6,502	211	6	241	12	55,179	6	105	571,078.25	39	19	69,970.39	34	8	4	36	15	26
28	Chelsea	1,061	150	264	107	76	0	0	581	1,090	7,876	294	102	162	8	211	110	4,426	2,563	2,010	261	27	741	25	9,310	1	68	362,476.33	8	10	13,873.00	85	31	1	89	237	27
29	Fourth Bristol, Attleboro	744	105	95	38	58	0	0	216	1,251	7,216	62	0	187	1	259	36	2,040	4,631	509	94	-	-	-	2,218	25	57	118,217.26	25	35	56,323.05	43	13	7	44	30	28
30	First Barnstable, Barnstable	1,691	57	125	47	92	2	0	433	2,837	12,330	70	63	573	4	395	53	7,431	3,741	1,841	175	23	1,145	1	1,511	41	43	49,216.36	27	37	101,792.37	66	17	8	70	29	29
31*	Chicopee	159	23	88	86	8	1	0	38	609	5,155	160	5	139	2	72	42	3,709	1,026	0	36	20	362	29	338	8	46	59,977.14	45	26	24,817.21	4	14	5	14	0	30
32	Brighton	995	82	337	49	65	1	0	325	782	6,453	199	76	128	5	98	50	3,134	2,763	995	75	9	200	4	31,770	4	28	96,212.36	11	21	47,646.49	55	17	3	57	31	31
33	Central No. Essex, Haverhill	770	240	111	51	76	3	0	1,530	1,836	5,539	77	30	314	0	163	32	2,834	2,089	367	115	9	316	19	916	10	85	99,076.00	44	44	56,722.80	89	20	7	67	53	32
34	East Boston	527	72	197	47	51	0	0	486	828	3,231	129	29	53	8	50	78	1,686	1,198	26,442	249	13	198	10	88,045	6	165	106,531.22	20	15	40,895.60	38	14	7	61	54	33
35	1st So. Worcester, Dudley	414	48	98	71	11	0	0	132	995	9,149	200	13	134	3	104	33	7,521	1,141	226	216	28	382	4	4,133	6	42	56,436.46	47	75	87,253.48	116	30	22	134	78	34
36	Third Plymouth, Plymouth	909	181	137	26	54	4	0	429	1,926	7,039	246	3	318	1	349	76	4,881	1,165	139	218	29	1,074	7	2,874	14	15	115,299.45	12	31	43,891.14	46	1	2	31	26	35
37	Peabody	616	59	53	23	44	1	0	402	892	6,257	128	0	192	0	120	35	4,181	1,597	780	135	15	1,201	1	6,667	2	13	48,677.60	8	11	33,392.94	136	44	17	183	120	36
38	Brookline	976	171	120	37	53	4	1	270	817	1,845	11	0	28	1	23	38	989	755	9,509	39	0	138	1	119,401	1	11	24,560.00	6	7	94,475.79	88	21	14	118	67	37
39	Southern Norfolk, Stoughton	726	182	54	20	55	0	0	283	845	5,879	171	1	211	4	299	61	3,909	1,223	25	121	28	638	1	1,097	0	11	87,261.43	9	4	29,487.20	82	52	30	104	51	38
40	Fitchburg	1,021	129	81	54	14	0	0	305	1,406	5,384	114	2	211	2	161	30	3,728	1,136	62	142	22	418	11	18,542	0	121	185,922.91	31	21	41,198.62	118	85	15	165	229	39
41	Franklin, Greenfield	267	42	46	46	14	0	0	666	1,326	5,279	110	0	191	1	175	33	3,349	1,420	392	147	37	504	23	5,783	2	38	45,941.16	15	18	56,561.18	9	2	0	7	19	40
42	South Boston	276	6	121	9	11	1	0	294	556	2,098	56	61	78	0	71	40	293	1,497	10,436	5	2	371	3	25,504	3	89	120,295.82	1	13	24,109.14	17	3	0	23	59	41
43	Holyoke	226	33	68	25	18	1	0	69	622	6,494	173	16	207	1	84	17	2,114	3,880	7,559	323	30	572	7	12,169	12	8	114,255.90	1	9	40,708.64	97	31	2	102	37	42
44	1st No. Middlesex, Ayer	232	28	26	6	14	0	0	174	1,066	8,889	135	0	224	5	148	36	6,969	1,372	0	169	16	383	28	0	5	55	102,022.75	30	34	65,530.00	52	11	0	63	35	43
45	1st So. Worcester, Gardner	195	7	28	0	19	0	0	287	634	5,018	185	3	214	2	68	37	3,279	1,230	3,234	537	17	426	5	6,897	84	26	20,834.93	5	8	42,055.25	41	4	3	39	2	44
46	Marlborough	507	40	131	27	9	1	0	226	1,090	4,094	165	1	111	2	69	8	2,551	1,187	2,281	137	29	361	5	10,172	5	27	92,407.83	23	12	71,677.66	38	9	3	43	12	45
47	2nd East, Worcester, Clinton	264	30	46	21	9	0	0	249	436	5,296	93	2	119	6	135	23	3,956	962	0	142	35	445	0	5,035	3	39	96,551.41	25	10	48,468.47	73	13	6	73	62	46
48	Western Hampden, Westfield	225	27	53	25	12	0	0	40	770	4,667	112	18	184	0	175	31	3,488	659	74	85	23	311	4	2,320	0	1	25,732.96	6	22	41,102.73	54	74	20	354	371	47
49	4th Plymouth, Wareham	562	12	75	45	35	0	0	222	1,476	6,073	224	2	203	13	309	31	3,608	1,683	0	135	28	514	1	25	5	11	57,594.90	27	23	32,462.84	31	2	1	25	16	48
50	1st East, Worcester, Westborough	363	90	67	35	19	0	0	186	734	11,205	324	1	128	4	84	46	9,058	1,560	710	276	54	466	0	2,834	39	15	77,582.89	7	12	76,127.02	140	81	21	161	141	49
51	Eastern Essex, Gloucester	346	117	91	70	16	1	0	150	623	3,656	236	2	266	0	173	28	1,429	1,520	0	213	30	373	0	32,004	0	113	90,794.99	26	9	53,945.26	66	19	4	90	22	50
52	Eastern Hampden, Palmer	128	31	25	9	0	0	0	51	736	4,941	101	0	194	1	104	27	3,815	697	194	111	22	381	5	523	9	20	67,850.50	20	20	46,119.75	175	51	10	175	196	51
53*	Leominster	202	10	53	48	6	0	0	295	775	2,484	42	1	73	0	62	26	1,491	789	0	45	7	260	5	3,258	5	17	147,800.66	9	8	31,771.60	60	10	4	150	5	53
54	2nd So. Worcester, Uxbridge	283	83	32	32	4	0	0	83	274	2,872	155	0	49	4	23	23	1,620	998	0	86	16	278	3	295	1	14	29,153.88	12	5	32,111.83	42	17	5	53	100	54
55*	Natick	334	35	17	7	32	3	0	147	455	2,055	58	0	50	0	61	12	1,013	861	163	35	8	230	2	4,876	0	9	40,374.57	6	13	15,729.38	45	7	1	26	34	55
56	2nd Barnstable, Orleans	503	17	44	24	19	1	1	170	1,250	7,401	406	0	258	8	167	28	4,717	1,817	21	205	33	444	0	14,580	5	7	54,181.73	11	4	38,224.73	16	1	0	18	15	56
57	3rd So. Worcester, Milford	424	162	109	97	20	0	0	147	634	2,493	137	1	51	1	73	27	1,470	733	395	61	6	197	3	6,545	3	21	61,048.32	7	9	25,116.25	45	15	9	38	43	57
58*	Newburyport	300	32	58	23	18	0	0	75	531	3,746	120	1	68	3	206	19	2,278	951	429	112	32	342	1	5,269	2	25	74,419.00	2	5	25,160.25	10	2	0	15	3	58
59*	West, Worcester, E. Brookfield	123	14	22	15	5	0	0	111	516	1,849	85	0	31	0	32	12	1,227	442	0	78	4	170	15	81	0	6	22,941.97	17	9	15,318.91	33	10	4	42	60	59
60*	No. Berkshire, No. Adams	119	6	31	0	2	0	0	212	514	986	2	13	45	0	23	6	435	459	205	40	4	208	3	3,398	0	10	167,669.82	5	4	18,519.73	10	0	0	0	0	60
61*	Lee	92	2	13	5	4	0	0	11	[illegible]	3,485	40	0	99	0	88	7	2,825	426	38	76	4	215	11	445	1	6	24,985.00	1	4	10,594.00	11	0	1	2	13	61
62*	Second Essex, Amesbury	254	91	97	75	4	0	0	74	330	3,079	38	0	142	4	54	22	2,127	692	0	186	8	216	1	0	97	97	59,265.86	9	3	16,975.56	13	6	3	12	2	62
63*	Fourth Berkshire, Adams	65	32	10	10	3	0	0	30	329	1,089	36	0	35	0	64	6	723	225	139	31	3	1105	1	1,079	0	24	55,238.00	3	1	10,601.67	8	12	1	12	4	63
64	Charlestown	323	13	215	40	18	1	0	107	347	1,110	9	9	15	0	18	27	477	555	2,702	62	10	127	1	3,760	0	25	51,918.13	4	4	11,330.60	21	8	1	66	24	64
65*	So. Berkshire, Great Barrington	113	30	15	9	5	0	0	46	339	2,537	8	0	126	1	45	4	1,742	611	0	61	2	44	2	74	0	19	45,780.00	12	7	18,507.25	4	4	2	4	1	65
66*	Third Essex, Ipswich	50	7	9	6	4	1	0	25	167	583	44	7	37	0	32	0	287	176	73	23	8	59	0	6	0	3	13,341.00	3	2	8,554.98	18	3	0	30	6	66
67*	East, Franklin, Orange	24	6	5	3	0	0	0	45	127	671	10	0	23	0	20	8	447	163	0	10	1	59	3	0	1	19	14,111.51	0	4	5,470.00	0	0	0	0	0	67
68*	Williamstown	25	4	4	4	4	0	0	8	217	1,245	16	0	16	0	8	0	1,043	126	242	5	5	39	0	648	0	3	2,260.00	0	4	4,792.03	1	0	0	0	0	68
69*	East, Hampshire, Ware	63	18	4	4	2	0	0	16	215	372	2	0	12	0	16	1	170	171	0	16	2	54	2	267	0	9	4,215.00	6	0	10,031.35	1	2	0	2	2	69
70*	Winchendon	37	4	6	6	2	0	0	13	226	558	56	0	27	0	6	10	257	202	0	83	2	91	0	107	0	6	8,458.00	3	2	6,825.00	11	2	0	8	8	70
71*	Dukes, Edgartown	99	24	4	4	1	0	0	35	395	1,445	9	0	42	0	39	7	999	349	334	39	2	71	0	6,755	0	0	1,232.34	4	5	9,100.00	0	0	0	0	3	71
72*	Nantucket	37	4	2	1	4	0	0	2	166	468	7	0	21	1	23	2	230	184	156	19	0	87	0	3,138	0	0	0	2	3	11,529.00	0	0	0	0	2	72
	TOTALS	67,817	8,674	13,245	4,473	3,910	95	11	32,503	94,723	533,661	14,921	1,577	14,583	318	12,230	5,082	348,821	136,129	510,466	14,999	1,572	33,481	525	1,981,580	2,332	3,485	7,741,593.11	1,434	1,499	4,515,191.12	7,202	2,615	847	9,016	8,727	

* Indicates a court with a part-time Justice.

† "All other criminal complaints" is reported this year for the first time. It may be calculated for earlier years, however, by subtracting from "Total criminal complaints (except parking)" the sum of "Narcotics," "Drunkenness," "Gaming," "Operating under the influence of liquor," "Operating under the influence of drugs," "Operating so as to endanger," "Using without authority" and "All other motor vehicle complaints (except parking)."

Note: "Drunkenness," reported in earlier years, is no longer a crime. See Chapter 1076 of the Acts of 1971, effective July 1, 1973.

Appendix B.—15

MASSACHUSETTS DEFENDERS COMMITTEE

DISTRICT COURTS

REPORT OF CASES OF DEFENDANTS WHO WERE ASSIGNED BY COURTS TO BE REPRESENTED BY MDC AND DISPOSITIONS OF SUCH CASES.

7/1/73 to 6/30/74 (Period)

DEFENDANTS ASSIGNED BY COURTS:	COUNTIES														
	SUFFOLK	MIDDLESEX	NORFOLK	BRISTOL	DUKES	NANTUCKET	ESSEX	BERKSHIRE	PLYMOUTH	BARNSTABLE	HAMPDEN	HAMPSHIRE	FRANKLIN	WORCESTER	TOTALS
Pending at beginning	3039	1858	2394	257	2	0	4107	343	796	65	577	25	0	128	15457
Pending at end	4002	2363	2896	331	10	0	4392	399	1440	219	620	19	16	491	16587
Received in period	5610	1532	2	1034	18	0	1740	1205	3327	938	2854	576	80	2381	20229
Disposed in period	4649	997	0	963	10	0	1457	1120	2782	784	2231	62	64	2019	17128
Charges involved	7470	1825		2514	20	-	2712	1778	6230	1462	4454	108	160	4086	32825
Defts. Not Represented	935	256		205	2	-	278	66	418	163	327	1	0	156	2807
Charges involved	1589	455		533	3	-	556	123	841	192	628	1	0	382	5307
Defts. Represented	3707	741		758	8	-	1177	1054	2369	621	1704	61	64	1862	14324
Charges Involved	5882	1370		2253	17	-	2156	1765	5389	1220	3521	107	160	3678	27519
Defendants Tried	3379	694		614	7		1049	823	2221	566	1704	61	64	1496	12718
Defendants Released	3049	559		499	6		958	835	2068	528	1579	59	58	1305	11584
Defts. Committed	270	86		115	1		91	88	141	38	125	2	6	181	1164
Charges involved	5282	1187		1287	14		1859	1574	5032	1139	3178	107	160	3383	24487
Dismissed	2328	365		428	2		183	441	1099	162	1248	54	23	351	6689
Filed w/o a finding	14	2		17						9	24			25	91
Cont'd w/o finding	3			16			437	218	956	109	251	3		379	2371
Not Guilty	555	121		59	1		110	97	286	110	197	3	3	376	1918
Guilty Less.Offense	42	3		52			16				46				159
Guilty as charged	2831	696		1155	11		1243	818	2241	749	1482	47	134	1752	12859
Dispositions of all Guilty Findings:	3273	699		1307	11		1339	818	2241	749	1458	47	134	1752	13118
Probation	335	112		39			199	14	546	97	274	21	6	256	1599
Filed	635	97		457	3		164	225	672	132	143	3	14	488	3024
Fined	376	180		165	3		350	237	518	268	449	8	44	471	3069
Youth Serv., Susp'd	128	31					43	25	149	3	116		1	110	649
Youth Serv.Committed	150	50		3			48	73	49		30	1	12	98	514
HC under 6 mo.Susp'd	73	32		76			247	145	310	103	175	12	12	92	1247
HC under 6 mo.Comm'd	45	23		45			57	86	69	34	77	2	17	121	540
HC 6 mo.-1 yr.Susp'd	86	51		103	1		59	24	196	61	76		3	33	693
HC 6 mo.-1 yr.Comm'd	48	23		114	1		24	22	106	26	53		21	23	461
HC 1 yr.& more,Susp.	155	46		75	3		14	2	89	13	50		2	23	472
HC 1 yr.& more,Comm.	135	37		120			26	6	89	12	15		2	23	464
Mass.Corr'l Inst.Susp.	6	7					8								21
Mass.Corr'l Inst.Comm.	24	10		9			20		5					4	72
State Farm Committed	3														3
Sentences Accepted	3453	698		597	6		931	856	2895	506	1554	61	64	1334	11667
Charges involved	4823	936		1562	13		1872	1468	4644	1027	2947	107	160	2595	22296
Sentences Appealed	226	86		67	1		56	67	186	60	150	-	-	152	1051
Charges involved	344	151		165	1		117	106	368	110	231	-	-	289	1901

Defendants referred to TASC 10

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI,
Appellant

V.

MASSACHUSETTS,
Appellee

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

REPLY BRIEF FOR THE APPELLANT

ROBERT W. HAGOPIAN, ESQ.
WRENTHAM, MASSACHUSETTS 02093

10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI,
Appellant

V.

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ON APPEAL FROM THE MUNICIPAL COURT
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ARGUMENT

JURISDICTION

In its brief, the amicus does not expressly contest the jurisdiction of this court over appellant's appeal pursuant to 28 U.S. §1257(2). However, it continually denominates the de novo trial in the second tier of Massachusetts' two-tier procedure as an "appeal" and this does reflect on the issue of jurisdiction.

Appellant maintains that the de novo trial in the second tier is not an "appeal" within the context of § 1257(2). More specifically, there is no means in the de novo trial in the second tier of obtaining review

of the proceedings in the first tier:

> The appeal voided the judgment of the police court, and rendered immaterial all questions of the form of judgment or the correctness of the previous proceedings in that court. Commonwealth v. Calhane, 108 Mass. 431,432.[1]

Similarly, review of the record in the first tier cannot be obtained by appellate review in the Massachusetts Appeals Court or Supreme Judicial Court[2] subsequent to conviction in the second tier:

> In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts....We need not speculate whether convictions in the District Court resulted from error. Mann v. Commonwealth, ____Mass.____, 271 N.E. 2d 331,333(1971).

But even if appellate review could be had, the question of whether the accused was entitled to a jury trial in the first instance would have been rendered moot by his having been afforded a jury trial in the second tier.[3] Accordingly, appellant submits that the Municipal Court of the City of Boston is the "highest court" of Massachusetts "in which a decision of the Federal question could be had,"

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1 See also Commonwealth v. Sheehan, 108 Mass. 432.

2 G.L. Ch. 278 Sec. 31, 33A-33G.

3 Appellant's double jeopardy and speedy trials claims could be preserved by a motion to dismiss in the second tier. However, appellant has raised these claims in his appeal as they have an important bearing on the requested relief. See. pp. 47-48 of appellant's brief.

Kentucky v. Powers, 201 U.S.1, 37(1905). (original emphasis).[4]

THE INFORMAL MASSACHUSETTS PROCEDURE OF "ADMITTING TO SUFFICIENT FACTS TO SUPPORT A FINDING OF GUILTY" DOES NOT CONSTITUTE A WAIVER OF TRIAL

The amicus makes reference to an option open to the accused in the lower Massachusetts courts to "admit to sufficient facts to support a finding of guilty". Under this procedure, the accused pleads not guilty, but at trial, his attorney announces to the court that the Commonwealth has sufficient facts to obtain a conviction, and that the defendant admits to the facts. Thereafter, the government places its case in evidence in an informal manner. For instance, hersay evidence is freely admitted. The defendant is free to cross examine these witnesses, but he does not ordinarily offer any evidence unless it has a bearing on disposition. Accordingly, appellant summits that this procedure is nothing more than a short-cut trial and in no way should it be equated to "circumnavigating" a trial as is possible in the first tier of Kentucky's two-tier procedure, Colten v. Kentucky, 407 U.S. 104, (1972) or to waiving a trial as in the Maine procedure, Lemieux v. Robbins, 414 F. 2d (1st Cir. 1969), cert. denied, 397 U.S. 1017 (1970).

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4 It might also be added that appellant's exercise of his "right of appeal" was under complusion as 1) this procedural step had to be taken in order to obtain a jury trial (and hence it was not at the defendant's behest) and 2) his failure to exercise the right would be deemed a waiver of his right to trial by jury under Massachusetts procedural law.

THE STATISTICS SET FORTH BY THE AMICUS ARE MISLEADING

Initially, it should be observed that many of the percentage figures set forth by the amicus are based on the total number 533,661 of complaints in the district courts. However, of these, 348,821[5] relate to minor traffic violations wherein the maximum penalty is a small fine. These cases should be excluded in determining whether trial and conviction by a magistrate deter the accused from exercising his right to trial by jury as the defendant, under these circumstances, is not entitled to a jury trial at any time, Baldwin v. New York, 399 U.S. 66(1970).[6] Similiarly, those cases in which the accused pleads guilty should be excluded. Accordingly, appellant maintains that those percentage figures, such as the number of "appeals", based on the total of 533,661 complaints are misleading.

On page 7, the amicus states that the sentences imposed by the district court are seldom raised and this fact rebuts appellant's assertion that the threat of an increased penalty chills the right to trial by jury. The appellant agrees that

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5 See column 17 of Statistics For the District Court of Massachusetts for 1974 in Appendix A of the amicus' brief.

6 Where the maximum penalty is a fine under a hundred dollars and the stigma of conviction minimal, most defendants would waive a trial by jury initially if given the choice. See Justice White's ft. n. 22, in Baldwin v. New York, 399 U.S.66, 74(1970).

the percentage of increased penalties metered out in the superior court is small[7] but this percentage is misleading as it does not take in account that the district court sentence in many instances is augmented, and hence inflated, because the accused has exercised his "right of appeal". See pp. 29-30 of appellants brief; The Quality of Justice in the Lower Courts of Boston, Bing & Rosenfeld (1970), at pp. 86-87; and Grayson v. Montgomery, 421 F. 2d 1306 (1st Cir. 1970).

Quite apart from these considerations, the amicus' statistics neglect to set forth the most important percentages, namely the number of convictions in the district courts which are reversed upon "appeal". Records of the Boston Municpal Court, as reported by Bing and Rosenfeld,[8] show that 27% of those retried in the Superior Court had their convictions overturned,[9] and 44%[10], while found guilty

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7 Bing & Rosenfeld report the percentage at 1%. See The Quality of Justice in the Lower Criminal Court of Boston, (1970) at p.96.

8 The Quality of Justice in the Lower Criminal Courts of Boston, (1970), p.96.

9 16% were found not guilty and 11% had their cases placed "on file".

10 This percentage must be read in light of some of the augmented and inflated sentences imposed on account of the accused's having exercised his "right of appeal".

were given lighter sentences. In light of these figures, the question inevitably arises as to why "81% of those defendants who intially choose to challenge the state by pleading not guilty"[11] forgo their right to trial by jury". The short answer is that the district court trial and conviction deter the exercise of the right to trial by jury, and, as such, constitute an unconstitutional burden on the right.

G.L. C.278 SEC.25 DOES NOT PROTECT THE ACCUSED FROM BEING PENALIZED FROM ASSERTING HIS RIGHT TO TRIAL BY JURY

On p. 7, n.7 of its brief, the amicus argues:

> In any event, a defendant claiming an appeal to the Superior Court who is threatened with an increased sentence may withdraw his appeal at any time (G.L. Ch.2, §25). Thus, an accused is not penalized by asserting his right to trial de novo in the Superior Court.

Notwithstanding the amicus' misleading inferences, this bit of reasoning flies in the face of G.L. Ch. 278, §25, the pertinent part of which reads:

> The appellant [who has exercised his right for a trial de novo] may, at any time before the next sitting of the Superior Court for criminal business and at any time thereafter if no action shall have been taken by the Superior Court except continuance, come personally before the court from whose judgment the appeal was taken and withdraw his appeal.

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11 The Quality of Justice in the Lower Criminal Courts of Boston, p.95-96.

Accordingly, appellant submits that the accused who is convicted in the first tier does not have the right to withdraw his appeal "at any time" if he is "threatened with an increased sentence" in the Superior Court, and the amicus' citation of G.L. Ch. 278, §25 to support its assertions is, at a very minimum, misleading.

THE AMICUS' STATEMENTS WITH REFERENCE TO THE SPEEDY TRIAL ISSUE ARE INACCURABLE, MISLEADING, AND IMMATERIAL

On pages 5 and 8 of its brief, the amicus represents to this court that G.L. Ch. 276 §35 provides that no continuance for a period exceeding ten days may be granted without the consent of the accused and therefore, final disposition in the district court (absent the consent of the accused) occurs not longer than two weeks after the filing of the complaint. Notwithstanding this "statement", appellant submits that G.L.276 §35 does not dictate, or has it ever been construed to mean, that the accused, absent his consent, must be brought to trial within ten days from arraignment, or the filing of a complaint. What the statute does prohibit is the adjournment of a probable cause examination or a trial for more than ten days at a time absent the consent of the

defendant.[12] Accordingly, appellant submits that G.L. Ch.276 §35 does not support amicus' allegations that district court proceedings are concluded within ten to fourteen days from the filing of a complaint. Quite apart from this consideration, the amicus' "allegations" do not comport with reality.[13]

Continuing on at p.8, the amicus maintains that the defendant who "appeals" from the district court obtains a jury trial faster than the defendant whose case is begun by indictment in the Superior Court. To substantiate this assertion, the amicus states that G.L. Ch.278 §18 requires a defendant's "appeal" from a district court to be entered

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12 G.L. Ch.276,§35 reads:

Adjornments of examinations and trials

> Except in proceedings under sections eleven to nineteen, inclusive, of chapter two hundred and seventy-three, the court or justice may adjourn an examination or trial from time to time, not exceeding ten days at any one time against the objection of the defendant, and to the same or a different place in the county. In the meantime, if the defendant is charged with a crime not bailable, he shall be committed; otherwise, he may recognize in a sum and with surety or sureties to the satisfaction of the court or justice, or without surety, for his appearance for such further examination, and for want of such recognizance he shall be committed.

13 Unless the accused is arrested (as was Steven Costarelli), arraignment does not even take place for two to three weeks subsequent to the issuance of a criminal complaint.

on the return date following the day sentence is imposed in the district court[14] whereas the indictment route in the outlying counties may take up to six months as the "defendant may have to wait for a period of three to six months for a grand jury to convene". However, the amicus has neglected to inform this Court that "in the outlying counties" the Superior Court or six man jury sessions of the district court only sit two or three months out of the year and that in these counties the accused faces a "three to six months" delay in obtaining a trial by jury notwithstanding the fact that his "appeal" is entered the return following his conviction in the district court. Hence, in these counties, the total time between the issuance of a complaint and trial by jury may run between six months to a year.

Leaving this aside, amicus' time assertions are immaterial to the speedy trial claims at hand. The issue is not whether a trial by jury takes place within the outer limits of the Sixth Amendment, no more than it is whether the accused is given a trial by jury at some

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14 The return day is usally the following Monday, but in practice, compliance with this statute is far from uniform.

time. But rather, the issue is whether the imposition of a trial and conviction by magistrate burden the right to a speedy jury trial. Appellant submits that the stigma of a conviction creates a far greater "cloud of anxiety and suspicion" than mere public accusation, and it is this stigma that burdens the right.

TWO INTERVENING MATTERS

Appellant would like to call to this Court's attention the decision of the Supreme Judicial Court in Costarelli v. DeGuglielmo, No. 034, ___Mass. ___,(March, 1975), referred to on p. 30 n. 33 of appellant's brief; and The De Novo Prodedure - Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment, 55 B.U. Law Review (1975).

CONCLUSION

The amicus' brief is misleading and inaccurate. Besides begging the substantive issues, it ignores the constitutional rights of the accused. In short, the amicus has abdicated its responsibility to those it has been entrusted to defend.

Respectfully submitted,

Ralph W Hagopian

Robert W. Hagopian